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Supreme Court, U.S.
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No. 08-174

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IN THE

# Supreme Court of the United States

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JUDY WANG,

*Petitioner*,

v.

PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

*Respondents*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the district court abused its discretion by ruling on the first motion for summary judgment four weeks prior to the discovery deadline when the *pro se* plaintiff timely informed the district judge that additional discovery was needed to rebut the summary judgment motion?

2. Whether the district court erred by dismissing all of the *pro se* plaintiff's claims when the defendants' motions for summary judgment never addressed the *pro se* plaintiff's Equal Pay Act and state law conversion claims?

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IN THE

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No. ___

JUDY WANG,

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PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

None of the opinions in this case are published. The Court of Appeals' *per curiam* opinion whose review is sought is reproduced in the Appendix at 1a. The District Court's two memorandum opinions and final judgment are reproduced in the Appendix at 3a, 19a, and 33a, respectively.

## JURISDICTION

Jurisdiction is proper in this Court. The final judgment sought to be reviewed was entered by the United States District Court for the Northern District of Texas on April 20, 2007. Pet App. 33a-34a.

The Fifth Circuit Court of Appeals affirmed the district court's judgment with a *per curiam* decision entered on February 26, 2008. Pet. App. 1a-2a. Ms. Wang filed a Petition for Rehearing En Banc, which was denied on May 14, 2008. Pet. App. 30a. The petition was also considered as a Petition for Panel Rehearing, which was similarly denied on May 14, 2008. *Id.*

The present Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Panel Rehearing by the Fifth Circuit Court of Appeals and is timely pursuant to 28 U.S.C. §§ 1254(1); 2101(c) and Rules 13.1 & 13.3 of the Rules of the Supreme Court of the United States.

## STATUTES INVOLVED

Rule 8(a) of the Federal Rules of Civil Procedure states:

> Rule 8. General Rules of Pleading
>
> (a) Claims for Relief.
>
> A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a)

Rule 56(f) of the Federal Rules of Civil Procedure states:

> Rule 56. Summary Judgment
>
> . . .
>
> (f) When Affidavits Are Unavailable.
>
> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

Fed. R. Civ. P. 56(f)

## STATEMENT OF THE CASE

This is a discrimination and wrongful termination case decided on two motions for summary judgment in favor of the Respondent employers. Petitioner employee, Judy Wang, respectfully prays that a Writ of Certiorari be granted to review the decisions of the United States District Court for the Northern District of Texas ("district court") and the affirmation of same by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit").

*Ms. Wang's Employment*

Ms. Wang is a very intelligent, extremely hard-working, over 50-years-old, Taiwanese-American female who also has a limited English proficiency ("LEP"). Ms. Wang suffered a pattern and practice of blatant gender-, age-, race-, and national origin-based

discrimination by her supervisor Richard Treta[1] and others throughout her five-year employment as an insurance and securities agent for Respondents Prudential Financial Corporation and Prudential Insurance Company of America (collectively, "Prudential"). Specifically, Ms. Wang was denied training and other employment benefits given to younger and Caucasian agents. She was also not permitted to place advertisements with her picture when other, younger agents were permitted to do so.

In October 2004, Ms. Wang was suddenly terminated. This petite, graying lady was immediately escorted out of the building by not one, but two armed security guards. She was not permitted to take her personal possessions from her office, including her address book, client list, and prospective client list. Further, she was not allowed to exercise her vested stock options, and Prudential later claimed this failure prevented her from being compensated for the options. It took three weeks for any of her personal items to be returned. Some very valuable items have never been returned, including both client lists. In fact, her personal client list information was subsequently used by Treta and others in the office to inflate their own sales figures, and thus their commission income. Even some commissions she earned before her termination were ignored or miscalculated and have not been paid to this day.

Prudential has consistently offered only one reason for Ms. Wang's termination: she sold an insurance policy to a very close family friend that named Ms.

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[1] Initially, Richard Treta was a defendant below, but was dismissed from the suit. He was not an appellee at the Fifth Circuit nor is he a Respondent in this Honorable Court.

Wang's son as one of the beneficiaries in violation of Prudential's policies. While true on its face, this was a mere pretext for her termination. The investigation into the issue was completed four months prior to her termination and, it is Ms. Wang's understanding, that the investigating compliance department recommended that Ms. Wang's employment not be terminated. Nevertheless, Treta continued his discriminatory conduct toward Ms. Wang and terminated her contrary to the recommendation.

*Ms. Wang's Complaint*

After timely filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and obtaining a right to sue letter, Ms. Wang hired an attorney. Suit was brought in federal district court in the Northern District of Texas. Her counsel's first amended complaint alleged age, national origin, race, and retaliation discrimination pursuant to the ADEA[2], Section 1981[3], state discrimination claims[4], and some other state common law torts. But, after eleven months of inactivity on his part, Ms. Wang's attorney withdrew in a less-than-professional manner right before the amended pleading deadline.

Because her trust in attorneys was shaken, Ms. Wang elected to proceed *pro se* despite her LEP. Ms. Wang timely filed a motion requesting leave to amend her pleadings that was unopposed by Respondents. Pet. App. 39a. This motion explained

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[2] The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et. seq.*

[3] 42 U.S.C. §1981.

[4] Texas Labor Code § 21 et seq. (the state version of Title VII).

that her second amended complaint included claims her prior counsel had omitted. *Id.* at 40a. The district court granted the motion and allowed Ms. Wang's amended pleadings. Pet. App. 27a.

Ms. Wang's *pro se* Amended Complaint asserted, among other things, that Respondents' actions were "in violation of her rights to be free from hostile working environment, age, sex, and/or race discrimination." Pet. App. 36a. Ms. Wang also alleged that Respondents "wrongfully [took] Plaintiff's valuable personal property to Plaintiff's damage," and she alleged claims based on Respondents' "refus[al] to pay her earnings, entitlements, benefits, commissions, stock options," and other compensation-related benefits. *Id.*

Respondents filed an amended answer and a Rule 12(b)(6) Partial Motion to Dismiss for Failure to State a Claim.[5] Respondents, however, never filed a motion for a more definitive statement to clarify what claims Ms. Wang had added to her previously asserted Section 1981, ADEA, and state discrimination claims.

*First Summary Judgment*

On October 11, 2006, more than three months before the conclusion of the discovery period and four months before the deadline for dispositive motions, Respondents filed their first Motion for Summary Judgment. In this motion, Respondents moved to dismiss Ms. Wang claims for Section 1981 and ADEA and "assumed" she was asserting sex discrimination

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[5] The Motion to Dismiss was directed at a non-existent state law claim and Ms. Wang's claims against her supervisor, Treta, personally. The granting of that motion and dismissal of those claims is not part of Ms. Wang's petition to this Honorable Court.

based solely under Title VII.[6] *See* Pet. App. 7a, n.2. Furthermore, Respondents' motion totally ignored Ms. Wang's conversion claim (the "wrongfully taking Plaintiff's valuable property" language of her Complaint).

Ms. Wang timely filed a motion requesting more time to respond to the summary judgment. Pet. App. 42a. Among other reasons, this motion pointed out that (1) Respondents moved for summary judgment "far away" before the dispositive motion deadline, (2) "there is plenty of time for the completion of the Discovery findings", (3) English is Ms. Wang's second language and she needs "additional time for reasonable accommodation," (4) Respondents had failed to produce certain specific discovery items to her, (5) her prior attorney was withholding some of her "original documents of evidence," and, most importantly, (6) the "EEOC has lost Plaintiff's files and is still looking for" various specific items, including "the Charges of Sexual Harassment, Race, Age, and Compensation Discrimination, also Hostile working Environment, etc. Plaintiff did not receive a 'New Determination Letter' after the new additional charges." *Id.* 42a-45a.

Despite these numerous difficulties, Ms. Wang requested only a week's extension, which the district court granted. Pet. App. 28a. Then, in Ms. Wang's response to the Respondents' motion for summary judgment, she again pointed out in the Arguments and Authorities section that the EEOC still had not found her file. Failure to exhaust administrative remedies was a key component of Respondents' summary judgment motion. *See* Pet. App. 11a. Rather than grant Ms. Wang another extension, or to

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[6] 42 U.S.C. §2000e *et. seq.*

postpone ruling on the summary judgment motion until the EEOC file could be located, the district court prematurely adjudicated the motion and dismissed the ADEA, Section 1981, and Title VII based claims. Pet. App. 3a.

Additionally, Ms. Wang's summary judgment response specifically mentioned under the "Statutes Relied Upon" section, that she was relying on the Equal Pay Act ("EPA").[7] In the "Arguments and Authorities" section of her brief, she argued that the EPA

> requires that men and women be given equal pay for equal work in the same establishment. . . . Specifically, the EPA provides: Employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.

Apparently, the district court understood this assertion by Ms. Wang because, although it prematurely granted summary judgment on the ADEA, Section 1981, and Title VII claims, the district court did not rule on her EPA claim and also determined that Ms. Wang's "compensation-based" claims survived Respondents' first motion for summary judgment. Pet. App. 18a. Importantly, the district court's memorandum opinion did not address, much less dismiss, Ms. Wang's conversion claim.

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[7] 29 U.S.C. § 206(d).

*Second Motion for Summary Judgment*

After Respondents took Ms. Wang's deposition, they again moved for summary judgment purportedly on all remaining claims. However, Respondents continued to attack these claims in the context of a Title VII action only; asserting as the basis for their summary judgment that each of the compensation items at issue occurred more than 300 days prior to the date Ms. Wang filed her Charge with the EEOC. *See* Pet. App. 23a. The statute of limitations for an EPA claim, however, is two years for a normal violation and three years for a willful violation. Moreover, an EPA violation does not even require a charge be filed with the EEOC. Similarly, the state law conversion claim's statute of limitations is two years and it does not require a charge be filed with the EEOC either. Thus, the Respondents entire second summary judgment motion failed to attack the basis for Ms. Wang's remaining claims.

Inexplicably, this time the district court ignored Ms. Wang's previous assertion of her EPA claims and the plainly worded conversion claim when it erroneously granted Respondents' motion; thereby dismissing all of Ms. Wang's claims. Pet. App. 26a & 33a. In effect, the district court strictly construed, rather than liberally construed, Ms. Wang's *pro se* second amended complaint. Moreover, the court ignored Ms. Wang's previously clear statement that she was expanding the claims her lawyer filed and her clearer statement that she was bringing an EPA claim for discrimination as well.

As a result, a final judgment was entered dismissing all of Ms. Wang's claims, despite at least two claims never being the subject of a motion for summary judgment. *See* Pet. App. 33a. Ms. Wang's

constitutional right to a jury trial, therefore, was denied her.

*Appeal to the Fifth Circuit*

Ms. Wang timely filed two *pro se* notices of appeal to the Fifth Circuit. In her Appellant's brief in the Issues Presented section, Issue No. 4 stated "Whether the district court . . . erred in dismissing the compensation-based claims . . . but were actually 'related' to the discrimination-based claims." And then she pointed out these claims were the result of discrimination by age, sex, race and the "Equal Pay Act." Her argument discussing the compensation-based claims stated, "Section 1981 was left out and should also be including [sic] EPA and Harassment." She also pointed out the limitations period was two or three years depending on willfulness and that there are no administrative hurdles to an EPA claim before filing suit.

In her reply brief, in "Issue 6," she questioned whether dismissal was proper before the discovery deadline was due. Likewise, "Issue IX [sic]" in the argument section stated "District Court erred in granting early Initial summary judgment motion on 12/13/2006 prior to discovery 1/16/2006." Her argument under this point stated, "Because of the requirement that the nonmoving party be permitted to conduct necessary discovery, summary judgment is often considered inappropriate early in a case." Thus, both arguments presented in this Honorable Court were not waived below by the *pro se* appellant.

Nevertheless, in a one sentence *per curiam* opinion, the Fifth Circuit affirmed the district court's erroneous actions. Ms. Wang's *pro se* Petitions for Rehearing En Banc and to the Panel were subsequently denied.

## REASONS FOR GRANTING CERTIORARI

Petitioner submits the following in support of her Petition for Writ of Certiorari to review the decision of the Fifth Circuit affirming the district court, which erroneously granted Respondents' two motions for summary judgment and dismissed all claims.

### I. INTRODUCTION

The district court abused its discretion by granting Respondents' first motion for summary judgment an entire month before the discovery period ended rather than liberally construe the *pro se* Petitioner's summary judgment response as a *de facto* Rule 56(f) motion. Thus, the district court egregiously failed to either delay its ruling on the motion or grant a continuance so that discovery could be completed.

Additionally, contrary to well-settled summary judgment standards, the district court improperly dismissed two of the *pro se* plaintiff's claims that were never made part of the Respondents' motions for summary judgment. This egregious failure is made more heinous because in doing so, the district court ignored more than thirty years of this Court's precepts requiring a court to liberally construe, rather than strictly construe, a *pro se* plaintiff's complaint.

Because the district court, and the Fifth Circuit in sanctioning such action, has so far departed from the accepted and usual course of judicial proceedings, this Honorable Court should exercise its supervisory power and correct these errors.

For these reasons, this Petition for Writ of Certiorari should be granted.

## II. STANDARDS OF REVIEW

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548 (1986). All evidence and the inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1123 (5th Cir. 1979). Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986).

A district court's decision to end discovery and rule on a motion for summary judgment is reviewed with an abuse of discretion standard. *Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 753 (5th. Cir. 2005); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 918 (5th Cir. 1992), *cert. denied*, 508 U.S. 910, 113 S. Ct. 2340 (1993).

A document filed *pro se* is "to be liberally construed" and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007) (internal citations omitted) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972) (per curiam).

## III. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION WHEN IT ADJUDICATED THE FIRST SUMMARY JUDGMENT PRIOR TO THE CONCLUSION OF DISCOVERY.

Rule 56(f) is the mechanism for a summary judgment opponent to obtain an extension to conduct more discovery. *See* Fed. R. Civ. P. 56(f). In this case, the *pro se* plaintiff's summary judgment response served as a functional equivalent of a Rule 56(f) motion.

The purpose of Rule 56(f) is to provide non-movants with a tool to keep open the doors of discovery in order to adequately respond to a summary judgment motion. *Wichita Falls Office Assocs.*, 978 F.2d at 919 (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (citing *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (en banc), *cert. denied*, 414 U.S. 1116, 94 S. Ct. 849 (1973)). The decision whether to grant a continuance under Rule 56(f) rests in the sound discretion of the trial court. *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082, 101 S. Ct. 866 (1981).

As the Fifth Circuit has stated,

> Although it is preferred that non-movants present an affidavit to support a continuance of discovery, there is no stringent procedure that will bar litigants access to further discovery. In order to trigger the rule non-movants need only submit an "equivalent statement preferably in writing" that conveys the need for additional discovery.

*Wichita Falls Office Assocs.*, 978 F.2d at 919. The continuance of a motion for summary judgment for

purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery. *Id.* at 919 n.4 (emphasis supplied).

The non-movant must establish the following three general requirements for a continuance of discovery. The non-movant must (1) request extended discovery prior to the court's ruling on summary judgment, (2) put the trial court on notice that further discovery pertaining to the summary judgment motion is being sought, and (3) demonstrate to the trial court specifically how the requested discovery pertains to the pending motion. *Id.* at 919 (citing *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1268 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S. Ct. 936 (1992)). Additionally, the non-movant must not have caused his own predicament by not diligently pursuing relevant discovery. *Id.*

Ms. Wang met all of these requirements in her motion for a one-week continuance, which the trial court granted. Pet. App. 42a; 28a. In her summary judgment response, she met those requirements again. Nevertheless, the trial court failed to grant her a more substantive continuance this second time.

In "Section II" of her summary judgment response, entitled, "Plaintiff has had [sic] exhausted the Administrative remedies with the EEOC," Ms. Wang stated again that the "EEOC is still looking FOR THE PALINTIFF'S [sic] FILE." She went on to point out that if she had the file, she could show that "[t]he contents included the charges of Sexual Harassment, Race, Age, and Compensation Discrimination, also Hostile working Environment, etc." Obviously, under Fifth Circuit precedent, this wording in a *pro se* motion satisfies the Rule 56(f). *See Wichita Falls*

*Office Assocs.*, 978 F.2d at 919. Especially when this Honorable Court has mandated that a *pro se* litigant's filings be liberally construed and not held to the same level of competence as an attorney's filings. *See Erickson*, ___ U.S. at ___, 127 S.Ct. at 2200.

Because such a motion "should be granted almost as a matter of course," *Wichita Falls Office Assocs.*, 978 F.2d at 919, the district court clearly abused its discretion in not affording Ms. Wang more time for discovery; especially to obtain the very EEOC charges that would rebut the Respondents ultimate persuasive argument that Ms. Wang had failed to exhaust her administrative remedies. *See* Pet. App. 23a-24a. Similarly, the Fifth Circuit erred in affirming the district court's judgment and abandoning its own precedent on this issue.

Ms. Wang's Petition for Writ of Certiorari should be granted to correct this egregious error.

## IV. THE DISTRICT COURT FAILED TO FOLLOW BASIC SUMMARY JUDGMENT STANDARDS AS WELL AS TO LIBERALLY CONSTRUE THE *PRO SE* COMPLAINT; THUS, IT ERRONEOUSLY DISMISSED TWO CAUSES OF ACTION NOT MADE THE SUBJECT OF RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT.

*Second Amended Complaint*

Federal Rule of Civil Procedure 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of this requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it

rests." *Bell Atl. Corp. v. Twombly*, ___ U.S.___, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99 (1957)). A plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

The standard of notice pleading operates in conjunction with liberal discovery rules and summary judgment motions to ascertain genuine factual disputes and viable legal theories. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992 (2002). Where a pleading does not suffice to give a defendant proper notice of claims asserted against him, he may move for dismissal pursuant to Rule 12(b)(6) or for a more definite statement pursuant to Rule 12(e). *Id.* at 514.

When construing a complaint, the Court must "accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (per curiam). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974. Importantly, a *pro se* litigant's complaint must be liberally construed, and will be held to less stringent standards than pleadings drafted by lawyers. *Erickson*, ___ U.S. at ___, 127 S. Ct. at 2200.

In her second amended complaint, Ms. Wang, a *pro se* plaintiff, stated her claims, in part, as follows:

> [F]urther, Defendant's action in terminating Plaintiff not only was a breach of contract to Plaintiff's damage but was also done in violation of good faith and fair dealing and in a malicious manner with apparent intent to humiliate her and embarrass Plaintiff, wrongfully taking

> Plaintiff's valuable personal property to Plaintiff's damage, and in violation of her rights to be free from hostile working environment, age, sex, and/or race discrimination, for which Plaintiff also seeks exemplary damages against Defendant, further Defendant has failed and refused to pay Plaintiff her earnings, entitlements, benefits, commissions, stock options, 401K 4% contribution plan, health, dental and life insurance, and education assistance programs, continuing, new and review business commissions, loss of pending potential, [sic] million-dollar insurance contracts;, annuities, "401K roll-over" business, and earned bonuses, and home, life, property and casualty, "group benefit program and ESOP benefit project and 1200 business leads and 2-weeks of pending appointments, to which Plaintiff is and was then rightly and justly entitled to benefit from, all to Plaintiff's damage . . . .

Pet. App. 36a. (Emphasis supplied.) As the underlined portions indicate, on the face of her pleadings, Ms. Wang alleged claims for (1) breach of contract, (2) good faith and fair dealing, (3) conversion, (4) age discrimination, (5) gender discrimination, and (6) race discrimination. (The exact legal basis for the discrimination claims is uncertain.) There is also a long set of what the district court later called "compensation-based" claims.

*Conversion Claim*

In Texas, a conversion claim can arise when property is taken from the plaintiff wrongfully. *Staats v. Miller*, 240 S.W.2d 342, 344 (Tex.App.—Amarillo 1951), *rev'd on other grounds*, 243 S.W.2d 686 (Tex. 1951). The elements of such a claims are (1) plaintiff owned, possessed, or had the right to

immediate possession of property, (2) the property was personal property, (3) the defendant wrongfully exercised dominion or control over the property, and (4) plaintiff suffered damages. *See Ojeda v. Wal-Mart Stores*, 956 S.W.2d 704, 707 (Tex. App. San Antonio 1997, pet denied). Clearly Ms. Wang's *pro se* allegation that Respondents "wrongfully [took] Plaintiff's valuable personal property to Plaintiff's damage" suffices to state a common law conversion claim in Texas.

*Equal Pay Act Claim*

Respondents never filed a Rule 12(e) motion for more definitive statement regarding Ms. Wang's discrimination claims. *See* Fed. R. Civ. P. 12(e). Instead, they moved for summary judgment and again incorrectly "assumed" her gender-based discrimination claims were Title VII-based. Pet. App. 21a-22a. Part of their summary judgment evidence were quotations from Ms. Wang's deposition, where she testified that the compensation claims were based on discrimination by Respondents.[8] Respondents, however, never asked Ms. Wang whether Title VII was the basis of her complaint on these items. Indeed, they never asked her the legal basis for any of her remaining claims.

Prior to her deposition, in her response to the first summary judgment motion, Ms. Wang informed Respondents and the district court that her sex discrimination claim was based on the Equal Pay Act, which prohibits sex-based pay discrimination.[9] This

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[8] The relevant passage is quoted by the district court in its memorandum opinion. Pet. App. 21a.

[9] The Equal Pay Act, article 29 U.S.C. § 206(d) is entitled, "Prohibition of sex discrimination."

is not only entirely consistent with the history of the case, but more logical than Respondents' Title VII assumption.

Ms. Wang's original counsel filed claims for Title VII, but those were dismissed with prejudice on Rule 12(b)(6) grounds. Her counsel's amended complaint neither asserted any Title VII claims nor, importantly, an EPA or conversion claim. After becoming *pro se*, Ms. Wang filed a motion to amend her pleading, which was unopposed by Respondents and granted by the district court. Pet. App. 39a; 27a. Her motion stated that her previous counsel "failed to properly state Plaintiff's full complaint." *Id.* at 39a.

Clearly, Ms. Wang's request to expand her pleadings, her *pro se* second amended complaint, and her first summary judgment response were sufficient to put the Respondents and the district court on notice of her EPA claim. Further, if Respondents were confused as to the basis of Ms. Wang's claims, the proper procedure is to file a Rule 12(e) motion or depose her regarding her legal basis. Respondents did neither.

*Second Summary Judgment*

Despite Ms. Wang's statements and clarifications, both the Respondents and the district court "assumed" Title VII was the basis for the remainder of Ms. Wang's claims. Pet. App. 21a-22a. In its memorandum opinion, the district court went so far as to erroneously analyze all the compensation-based claims and, presumably, the conversion claim under the Title VII rubric. Pet. App. 23a-25a.The district court concluded that Ms. Wang was barred from recovering for all specified compensation items be-

cause each one occurred more than 300 days prior to Ms. Wang filing her EEOC charge. *Id.*

However, the EPA, as part of the Fair Labor Standards Act, does not require exhaustion of administrative remedies like Title VII does. *Cf.* 42 U.S.C. §2000e-5 (Title VII provisions). Moreover, the statute of limitations for an EPA claim is two years, not 300 days, and is even extended to three years for a willful violation. *See* 29 U.S.C. §255(a). A common law conversion claim in Texas also has a two-year statute of limitation. Tex. Civ. Prac. & Rem. Code §16.003(a); *Millan v. Dan Witter Reynolds, Inc.*, 90 S.W.3d 760, 764 (Tex.App.—San Antonio 2002, pet denied).

Further, Ms. Wang was terminated in October 2004 and filed her second amended complaint on September 15, 2006; thus, all of her termination-related compensation claims occurred well within two years of her bringing suit. And, some, if not all, of her EPA claims occurred within three years of her bringing suit. "Sex-based, discriminatory wage payment violations constitute a continuing violation of the EPA;" thus, the relation-back doctrine applies. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir. 1973), *cert. denied*, 414 U.S. 822, 94 S. Ct. 121 (1973). Accordingly, none of Ms. Wang's EPA claims are susceptible to a limitations defense, much less the 300 day rule applied by the district court. Finally, because the unlawful conversion occurred on the date of her termination and afterward, the conversion claim is not time-barred either.

In essence, the district court's improper granting of summary judgment on the conversion and EPA claims occurred because Respondents failed to meet their summary judgment burden. *See* Fed. R. Civ. P.

56. Neither motion for summary judgment addressed the EPA or conversion claims. It is well-settled that "once the moving party has made an initial showing," the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. However, Respondents failed to make the first showing on these two claims. Accordingly, under the rule, they were not entitled to judgment as a matter of law. *See, e.g., Adams v. Travelers Indem. Co.*, 465 F.3d 156, 161 (5th Cir. 2006) (reversing movant-defendant's motion for summary judgment, even when plaintiff filed no response, because movant failed to meet its burden under Rule 56).

The district court's error in basic summary judgment procedure is so egregious, that this Honorable Court should grant Petitioner's Application for Writ of Certiorari and restore Ms. Wang's two claims wrongfully denied her by the district court's error.

## CONCLUSION

The district court clearly abused its discretion by not granting petitioner's *de facto* Rule 56 (f) motion, which resulted in the erroneous granting of the Respondents' first summary judgment. Also, viewing the evidence in the light most favorable to the Petitioner, questions of material fact exist concerning the conversion and Equal Pay Act claims asserted in the *pro se* complaint that were erroneously dismissed in the second summary judgment.

Moreover, the district court in both of its summary judgments, and the Fifth Circuit in its *per curiam* approval thereof, has flaunted the longstanding precedent of this Honorable Court that requires lower

courts to liberally construe a complaint and the other filings of a *pro se* plaintiff.

Because the district court, and the Fifth Circuit in sanctioning such action, has so far departed from the accepted and usual course of judicial proceedings, this Honorable Court should exercise its supervisory power and correct these egregious errors by granting Petitioner's Application for Writ of Certiorari.

Respectfully submitted,

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August 11, 2008

# APPENDIX

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 26, 2008]

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No. 07-10534
Summary Calendar

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JUDY WANG,
*Plaintiff-Appellant,*

v.

PRUDENTIAL FINANCIAL CORPORATION; PRUDENTIAL INSURANCE COMPANY OF AMERICA, doing business as Prudential Insurance Company; RICHARD TRETA,
*Defendants-Appellees.*

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Appeals from the United States District Court for the Northern District of Texas USDC
No. 3:05-CV-02091

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Before HIGGINBOTHAM, STEWART, and ELROD, *Circuit Judges.* PER CURIAM:

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Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent, except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Having reviewed the district courts' decisions,[1] the parties' briefs, and the record on appeal, we find no reversible error and accordingly AFFIRM.

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[1] *See Judy Wong u. Prudential Fin. Corp.*, No. 3:05-CV-0891, 2007 WL 1186556 (N.D. Tex. Apr. 20, 2007); *Judy Wong v. Prudential Fin. Corp.*, No. 3:05-CV-0891, 2006 WL, 3702642 (N.D. Tex. Dec. 13, 2006); *Judy Wang v. Prudential Fin. Corp.*, No. 3:05-CV-0891, 2006 WL 1489427 (N.D. Tex. May 25, 2006).

## APPENDIX B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

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Civil Action No. 3:05-CV-2091-B

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JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORP., PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a PRUDENTIAL INSURANCE COMPANY, AND RICHARD TRETA,

*Defendants.*

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MEMORANDUM ORDER

Before the Court is Defendants' Motion for Summary Judgment (doc. 68), and Defendants' Rule 12 (b) (6) Partial Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted (doc. 67). The Court GRANTS both motions for the reasons stated below.

I. Factual and Procedural Background

Plaintiff Judy Wang is an Asian female over age 50. (*See* May 25, 2006 Memorandum Order at 1). Defendants Prudential Financial Corporation and Prudential Insurance Company of America d/b/a Prudential Insurance Company (collectively, "Prudential") employed Wang as a statutory insurance agent until her employment was terminated in October 2004. (App. in Supp. Defs.' Mot. Summ. J. ["Defs. App."] at 2). In December 2003, Wang entered into a "Statutory Agent Agreement" (the "Agree-

ment") with Prudential, pursuant to which she was appointed an agent of the company able to provide investment advisory services and to solicit applications for various financial services and insurance products issued or marketed by Prudential. *(Id.* at 2, 5). The Agreement specified that nothing contained in the Agreement was intended to create a contract of employment for any definite period of time and that Wang's association with Prudential was terminable at-will by Wang and Prudential alike, with or without notice. *(Id.* at 2, 11).

In March 2004, Richard Treta, the Managing Director of Prudential's Lone Star Agency out of which Wang worked, was notified that Wang's adult son, John M. Wang, had been listed as one of two primary beneficiaries on a life insurance policy application written by Wang on behalf of a client, Charlene Weathers. *(Id.* at 1-2). Without receiving the approval of Treta or anyone in agency management, Wang listed her son as Weathers's "adopted grandson" on the policy application. (*Id.* at 2). Treta notified Prudential's Retail Compliance and Risk Management team (the "Compliance Team") that this designation potentially violated the company's compliance policies *(Id.).* The Compliance Team reviewed Weathers's policies and discovered that Wang had completed a change of ownership on a previously-issued $75,000 policy naming her son as the new policyholder and primary beneficiary. *(Id.).* The policy had originally been sold by Wang and issued to Weathers in December 2001, with John M. Wang being identified as Weathers's "adopted grandson", both on the original policy application and on the change of ownership form. (*Id.*).

Prudential investigated the matter and determined that while Wang and Weathers did in fact have a

close personal relationship, John M. Wang was neither an immediate family member of Weathers', nor was he her grandson, or even a legally adopted grandson. *(Id.* at 2-3). Treta asserts that, after interviewing Wang, it appeared to him that both applications had been completed for Wang's own personal compensation as opposed to the best interests of the client, Weathers. *(Id.* at 3). Prudential determined that, in misrepresenting the relationship of her son to the client, Wang had created a potential conflict of interest by placing herself and/or her son in a position to benefit from a client's life insurance policy. *(Id.).* Treta determined that Wang's actions were in violation of company policies, and he recommended the termination of her employment. *(Id.).* The Compliance Team accepted this recommendation and decided to terminate Wang as a Prudential agent. *(Id.).* Treta notified Wang of the termination decision on October 8, 2004. *(Id.).* Treta asserts that Wang's race, sex, and/or age played no role in her termination. *(Id.).*

Wang filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") on July 25, 2005. *(Id.* at 1314). On her Charge Wang checked the box for "age" discrimination, but no other, and described the particulars of her complaint as follows:

> I believe I was discriminated against because of my age, 56, in violation of the Age Discrimination in Employment Act. I have found out as of July 22, 2005, in the Asian Gazette newspaper, that a younger Prudential Financial insurance agent, Linda Wu Jordan, whom I had previously worked with, has been allowed to advertise as an automobile insurance agent. When she previ-

> ously worked with me, she did not have the license for automobile insurance but when she obtained it, she was allowed to advertise as an automobile insurance agent and I was not allowed to do so while I was employed at Prudential Financial.

*(Id.* at 14). Wang filed this lawsuit on October 24, 2005, bringing the following causes of action against Prudential and Treta for violations of the Age Discrimination in Employment Act of 1967 ["ADEA"]; Title VII (race discrimination, racially hostile work environment, and retaliation); 42 U.S.C. § 1981; and the Texas Labor Code and Texas Human Rights Act ["TCHRA"]; and for intentional infliction of emotional distress, negligent supervision, retention, and training, and defamation. (*See generally* Pl.'s Orig. Compl.). On November 22, 2005, Defendants filed a partial motion to dismiss Wang's claims under Rule 12(b) (6), Federal Rules of Civil Procedure. On May 25, 2006, Judge Barefoot Sanders, to whom this case was originally assigned[1], issued an order granting the motion in part, dismissing with prejudice Wang's claims against Prudential for violations of the TCHRA and for race discrimination and retaliation under Title VII. (*See* May 25, 2006 Memorandum Opinion and Order at 5). Wang's Title VII, TCHRA, and ADEA claims asserted against Treta in his individual capacity were dismissed as well. *(Id.).* Shortly after the Court issued its order, Wang filed a First Amended Complaint asserting claims for age discrimination under the ADEA and Section 21 of the Texas Labor Code, race discrimination, disparate treatment, and hostile work environment under 42 U.S.C. § 1981,

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[1] This case was transferred to this Court on July 21, 2006 pursuant to Special Order No. 3-253.

negligent supervision and retention, and defamation. (*See generally* Pl.'s First Am. Compl.). With Wang's consent, her counsel withdrew from their representation on August 29, 2006, and Wang has been proceeding *pro se* ever since. On September 15, 2006, Wang filed a Second Amended Complaint in which she asserts that Prudential wrongfully terminated her and in so doing breached a contact, breached the duty of good faith and fair dealing, and violated "her rights to be free from hostile work environment, age, sex, and/or race. Discrimination[.]" (Pl.'s Sec. Am. Compl. at p. 1).[2] Wang also alleges that Prudential has failed to pay her certain earnings, benefits, and commissions to which she claims entitlement. (*Id.*).

On September 22, 2006, Defendants filed a partial motion to dismiss under Rule 12(b)(6) seeking to dismiss all potential claims asserted against Treta in his individual capacity in this lawsuit as well as Wang's breach of the duty of good faith and fair dealing claim against Prudential on October 11, 2006, Defendants filed a motion for summary judgment seeking the dismissal of Wang's claims for breach of contract, breach of the duty of good faith and fair dealing, and all of her discrimination-based claims.

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[2] Wang fails to identify the specific statutory bases for these claims in her Second Amended Complaint. The Second Amended Complaint does, however, incorporate by reference the jurisdictional and venue averments contained in Wang's First Amended Complaint, which, in turn, reference 42 § 1981, the ADEA, and Section 21 of the Texas Labor Code. (*See* Pl.'s First Am. Compl. at 116). In the wake of Judge Sanders's May 25, 2006 order and in light of the allegations contained in Wang's Second Amended Complaint, Prudential proceeds on the assumption that Wang is asserting claims for race discrimination under § 1981, age discrimination under the ADEA, and sex discrimination under Title VII.

Prudential did not address Wang's assorted claims related to Prudential's alleged failure to pay her certain earnings and benefits. Wang never filed a response to the motion to dismiss but filed her response to the summary judgment motion on November 14, 2006. Defendants filed their summary judgment reply on November 22, 2006. Both motions are ripe for review and determination.

## II. Analysis

### A. Rule 12 (b) (6) Legal Standard

Motions to dismiss under Rule 12 (b) (6) are disfavored and rarely granted. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). The Court liberally construes the complaint in the plaintiff's favor, and all pleaded facts are taken as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986). Unless it appears beyond doubt that the plaintiff cannot prove any set of facts entitling it to relief, the complaint should not be dismissed. *Conley v. Gibson*, 355 U.S. 42, 45 (1957).

### B. Rule 56 Summary Judgment Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.*

The burden is on the summary judgment movant to prove that no genuine issue of material fact exists, *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.*; *Little,* 37 F.3d at 1075.

Once the movant has met its burden, the non-movant must show that summary judgement is not appropriate. *Little,* 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *id.* (quoting *Matsushita Elec. Indus. Co, v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for* trial.' *Matsushita,* 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the nonmovant, and the evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5th Cir. 2000); *Anderson*, 477 U.S. at 248.

C. Breach of Contract

The Court begins with Wang's charge that Prudential wrongfully terminated her employment with the company on October 8, 2004, in breach of the Statutory Agent Agreement in Texas, employment is at will, meaning that contracts of employment may be

terminated by either the employer or the employee "for good cause, bad cause, or no cause at all." *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App. — Houston [14th Dist.] 1988, no writ) ("In order to establish a cause of action for wrongful termination, an appellant must prove that he and his employer had a contract that specifically provided that the employer did not have a right to terminate his employment at will, and that the contract was in writing."). The at-will presumption is not rebutted simply because an employment contract is in writing. *Kadco Contract Design Corp. v. Kelly Servs., Inc.*, 38 F.Supp.2d 489, 494 (S.D. Tex. 1998) (citing *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App. — Houston Dist.] 1992, no writ)). Rather, an employment agreement must directly limit the employer's right to terminate an employee without cause in a "meaningful and special way". *See Massey v. Houston Baptist Univ.*, 902 S.W.2d 81, 83 (Tex. App. — Houston [1st Dist.] 1995, writ denied).

Far from limiting Prudential's ability to terminate Wang's employment without cause, the Statutory Agent Agreement explicitly provides that the Agreement is not "intended to create a contract of employment for any definite period of time" and that Wang's "association with the Company as a statutory employee as well as this Agreement are terminable at-will, and both the Company and you have the right to end the association at any time for any reason or no reason with or without notice." (Defs. App. at 11). The Statutory Agent Agreement thus reinforced rather than negated Wang's at-will status. Because Prudential was entitled to end Wang's employment with the company for any reason or no reason under

Texas law and the Statutory Agent Agreement, the Court finds that there exists no genuine issue of material fact with respect to Wang's breach of contract claim.

D. Duty of Good Faith and Fair Dealing

Wang also claims that, in terminating her, Prudential violated a duty of good faith and fair dealing. This claim must fail, as there is no duty of good faith and fair dealing in the employment context under Texas law. *See City of Midland v. O'Bryarit*, 18 S.W.3d 209, 216 (Tex. 2000).

E. Failure to Exhaust Administrative Remedies — ADEA and Title VII Claims

Prudential next argues that Wang is barred from bringing her age discrimination claim under the ADEA or her sex[3] discrimination claims under Title VII because she failed to exhaust her administrative remedies by including those claims in her EEOC Charge. In the Fifth Circuit, a plaintiff must exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to filing a civil action. *See Donis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). The central purpose of the exhaustion requirement is to allow the agency to fully inquire into and attempt to resolve discrimination claims. *See Clayton v.Rumsfeld,* 106 Fed. Appx. 268, 271 (5th Cir. Aug. 4, 2004). While the resulting suit is not limited to the specific complaints contained in a Charge, the suit *is*

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[3] As Prudential correctly points out, any race-based discrimination claim asserted by Wang under Title VII was dismissed with prejudice by *Judge* Sanders in his May 25,2006 order, To the extent that Wang is asserting a race claim under 42 U.S.C. § 1981, the exhaustion requirement does not apply. *See Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000).

limited by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination. *See Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993).

In the Charge filed by Wang on July 25, 2005, Wang only checked the box for age discrimination and did not check the box for any other type of discrimination. (Defs. App. 14). Wang's failure to mark certain types of discrimination in her Charge does not automatically preclude her from bringing suit on those types of discrimination. In the Fifth Circuit, "the crucial element of the charge of discrimination is the *factual* statement contained therein." *Sanchez v. Standard* Brands, *Inc.*, 431 F.2d 455, 462 (5th Cir. 1970) (emphasis in original). In her factual statement, Wang states only that she was discriminated against on the basis of her age in violation of the ADEA. The statement indicates that her age claim is premised on the fact that a younger Prudential insurance agent, Linda Wu Jordan, was allowed to advertise as an automobile agent in the Asian Gazette newspaper while she was not allowed to do so. (Defs. App. at 14). The factual statement fails to make any mention whatsoever of sex discrimination. In fact, the statement actually tends to refute the notion that Wang was discriminated against on the basis of sex (or race, for that matter), given that her complaint centers around the fact that another *Asian female* — Jordan[4] — was treated better than she was because she was younger. The Court finds that the facts alleged in Wang's Charge would not reasonably

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[4] Wang has attached copies of Jordan's advertisement in the Asian Gazette to her summary judgment materials. It is apparent from the advertisement that Jordan is a woman of Asian descent.

lead the EEOC to investigate any other form of discrimination but age discrimination. *See Anderson v. City of Dallas,* 116 Fed. Appx. 19, 24 (5th Cir. Oct. 28, 2004); *Gohe v. 7-Eleven, Inc.,* 2006 U.S. Dist. LUIS 4747, at *5-6 (N.D. Tex. Feb. 8, 2006). Because Wang failed to exhaust a claim of sex discrimination, she is barred from asserting that type of claim in this suit.

Wang's age claim presents a closer question. Prudential argues that the harm described in Wang's Charge — that a younger insurance agent was allowed to advertise as an automobile insurance agent — is far removed from a claim that she was terminated because of her age. The Court's inquiry is limited to whether Wang's complaint of age discrimination in connection with her termination is "like or related to" the allegations made in the Charge and whether an investigation into her termination claim could reasonably be expected to grow out of those allegations. Although Wang's complaint about not being allowed to advertise in an Asian publication, taken alone, may be only tenuously, if at all, connected to the circumstances surrounding her termination, Wang stated in her Charge that she believed she was discriminated against because of her age in violation of the ADEA, she checked the "age" box, and she indicated that the latest date on which the discrimination took place was October 8, 2004, the date of her termination. (Defs. App. 14). Regarding the facts alleged in the Charge as a whole, the Court finds that an investigation into whether Wang's October 8, 2004 termination was motivated in part by age discrimination could reasonably be expected to grow out of the factual allegations made in her Charge. Wang's age claim, then, is not barred for failure to exhaust.

F. Wang Has Failed to Raise a Fact Issue on Her Discrimination Claims

Prudential next argues that all of Wang's extant discrimination claims based on the ADEA (age), Title VII (sex), and § 1981[5] (race) fail on their merits, even assuming that they are properly before the Court. Because there is no evidence of direct discrimination in this case, the Court applies the modified *McDonnell Douglas* burden-shifting framework. *See Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004) (stating that standard of proof for Tide VII discrimination claims also applies to ADEA and § 1981 claims). Under that scheme, a plaintiff must first establish a prima facie case of discrimination. *Rachid v. Jack in the* Box, *Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). If the plaintiff meets this burden, then a burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. *Id.* If the defendant satisfies this threshold, then the plaintiff must produce evidence sufficient to raise a fact question "(1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiffs protected characteristic (mixed-motive[s] alternative)." *Id.*

To make out a prima fade case of discrimination, a plaintiff must establish that: 1) she is a member of a protected class; 2) she was qualified for the position

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[5] Race discrimination claims under 42 U.S.C. § 1981 are evaluated under the same analytical rubric as Title VII discrimination claims. *See Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002); *Walker*, 214 F.3d at 625.

at issue; 3) she suffered an adverse employment action; and 4) she was replaced by someone outside the protected class or others similarly situated were treated more favorably, *See Okoye v. Univ. of Texas Houston Health Sci.* Ctr., 245 F.3d 507, 512-13 (5th Cir. 2001). Prudential contends that Wang has failed to present any competent summary judgment evidence as to the fourth element — that is, that she has failed to show either that she was replaced by someone outside of her protected class or that similarly situated persons were treated more favorably than she was.

The Court examines whether Wang has met her burden of establishing a prima facie case by looking to the substance of the materials she submitted in response to Prudential's summary judgment motion. To say the least, Wang's response brief is confusing, diffuse, disordered, and, in many ways, incoherent. Rather than limiting her response to the specific legal claims actually asserted in her live pleading, Wang takes her response brief as an occasion to catalogue a wide array of grievances she has stored against Prudential and certain of its agents/employees since her affiliation with the company. Moreover, the "exhibits" to which Wang refers at times throughout the response do not correspond to her supporting evidentiary materials. Wang has thus failed in her duty to identify specific evidence in the record and to articulate the precise manner in which that evidence supports her claims. *See Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Although the Court is mindful of Wang's pro *se* status and her limited proficiency in the English language, "[t]here is a point at which even *pro se* litigants must become responsible for the prosecution of their own cases if their claims are to warrant the court's attention."

*Bookman* v. *Shubzda*, 945 F.Supp. 999, 1002 (N.D. Tex. 1996). The quality of Wang's evidentiary materials is also wanting. Wang has failed to even offer her own affidavit to support her claims, and the unsworn and unauthenticated documents that she did submit do not constitute competent summary judgment evidence. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (even pro *se* plaintiffs cannot rely on unsworn pleadings and unauthenticated documents to defeat summary judgment); *Baker v. Norman*, 651 F.2d 1107, 1123 (5th Cir. 1981).

In short, Wang has failed to present any admissible summary judgment evidence showing that she was replaced by someone outside her protected class or that those similarly situated to her were treated more favorably. Accordingly, she cannot make out a prima facie case of age, sex, or race discrimination. And even if she had, Prudential has proffered a legitimate, non-discriminatory reason for terminating her — namely, that she had misrepresentated a beneficiary's relationship to an insured client in violation of company policies. Wang appears to argue that Prudential's asserted justification is false because the Defendants were aware of the close relationship between her family and Weathers. (Pl. Resp. Brief at 29). The Court notes that Wang has submitted declarations from Weathers in which Weathers states that she "has accepted Judy and John Wang as a part of our family" and that John Wang "is the policy owner of that one insurance policy [.]" (*See* App. in Supp. Pl.'s Resp. at Tab B, at 1-4). This evidence, even if accepted, is insufficient to show that Prudential's reason for terminating Wang is a pretext for prohibited discrimination. After all, Prudential acknowledges the close relationship between the Wang family and Weathers. (Defs. App. at 3). Prudential

asserts that its decision to terminate Wang, however, was based on the fact that Wang violated company policies by: designating her son as Weathers's "adopted grandson" on Weathers's insurance application when, legally, he was not, failing to seek prior approval for making that designation; and creating an apparent conflict of interest by virtue of the designation. (Defs. App. at 2-3). Wang has thus failed to point to any admissible evidence that challenges the veracity of this assertion or which shows that prohibited discrimination played a part in the termination decision even if Prudential's asserted justification is true. *See Rachid,* 376 F.3d at 312. Prudential is thus entitled to summary, judgment on Wang's remaining discrimination claims.[6]

G. Wang's Claims Against Defendant Treta Should be Dismissed

The Court next turns to Defendants' argument that Plaintiff's Second Amended Complaint fails to state a cause of action against Defendant Treta. Judge Sanders had earlier dismissed with prejudice any claims against Treta in his individual capacity under the ADEA, Title VII, and the TCHRA. While Plaintiff's Second Amended Complaint, filed after *Judge* Sanders's ruling, continues to include Treta in the caption to that complaint, the body of the complaint itself fails to identify Treta even once. Wang has thus provided no basis upon which to hold Treta individually liable for her claims in this case, and the Court finds that all claims against Treta in his individual capacity should he dismissed as a matter of law.

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[6] The Court notes that Wang has failed also failed to produce any sort of admissible evidence which would support a hostile work environment claim.

H. Wang's Remaining Compensation-Based Claims

The Court observes that Prudential has not moved for summary judgment on or to dismiss Wang's claims concerning Prudential's alleged failure to pay her certain earnings, benefits, and commissions to which she allegedly became entitled during her tenure with the company. Given that these claims are all that remain pending in this case, the Court orders the parties to file a written joint report, within 10 days of the date of this order, regarding the status of those claims. The report shall contain a statement by Wang as to whether she intends to pursue such claims and, if so, a statement by Prudential as to whether it intends to file a dispositive motion as to those claims prior to trial.

III. Conclusion

For the reasons stated above, the Court GRANTS Defendant's motion for summary judgment (doc. 68) and motion for partial dismissal (doc. 67). Wang's claims against Prudential for breach of contract, breach of the duty of good faith and fair dealing, and for hostile work environment, age, sex, and/or race discrimination under the ADEA, Title VII, and 42 U.S.C. § 1981, respectively, are DISMISSED with prejudice. Wang's remaining claims asserted against Defendant Treta in his individual capacity are also DISMISSED with prejudice. As noted in Section II.H. above, the parties are ORDERED to provide a joint written report within 10 days of the date of this order regarding the status of Wang's remaining claims in connection with Prudential's alleged failure to properly compensate Wang.

SO ORDERED.

/s/ Jane J. Boyle
United States District Judge
Signed December 13th, 2006

## APPENDIX C

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

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Civil Action No. 3:05-CV-2091

---

JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORP., PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a PRUDENTIAL INSURANCE COMPANY, AND RICHARD TRETA,

*Defendants.*

---

MEMORANDUM ORDER

Before the Court is Defendants' Motion for Summary Judgment on Plaintiffs Remaining Claims (doc. 114). The Court GRANTS the motion for the reasons explained below.

I. Background

The facts of this case were set forth at length in this Court's December 13, 2006 Memorandum Order and need not be repeated here. In that order the Court dismissed with prejudice Wang's claims against Prudential for breach of contract, breach of the duty of good faith and fair dealing, and for hostile work environment, age, sex, and/or race discrimination under the ADEA, Title VII, and 42 U.S.C. § 1981. The Court observed in the order that Prudential did not move for summary judgment with respect to what the Court construed as Wang's claims against Pru-

dential for allegedly failing to pay her certain earnings, benefits, commissions, and reimbursements to which she became entitled during her tenure with the company.

At the time the Court believed that these compensation-based claims were unrelated to the discrimination-based claims Later, on January 5, 2007, the Court ordered Wang to file a one-page statement setting forth specific facts supporting her compensation-based claims. Wang filed her statement on January 12, 2007. Roughly speaking, Wang identified the following complaints:

1. Non-payment of fees associated with "Wang's prior authorized attending of Series 7 class and exam";
2. Non-payment of fees associated with obtaining "[t]he prior authorized Property/Casualty (Auto/Home) licenses";
3. Failure to reimburse Wang for "[t]he usual PRU authorized expenditures";
4. Certain "unearned commissions";
5. Failing to pay Wang for certain "authorized work" that she performed with Attorney Weddell Barnett;
6. Failure to pay Wang for accrued stock options
7. Failure to "register Wang's qualification" for lost series 65 exam

(Pl.'s January 12, 2007 One-Page Statement). Wang clarified at her deposition taken on January 16, 2007 that her remaining claims are premised on race, sex, and/or age discrimination. She testified as follows:

Q: Is it your contention that you were not paid the items listed [on Wang's January 12, 2007 one-page statement] because of some form of discrimination?

A: Yes.

Q: Okay. And what type of discrimination are you claiming caused you not to be paid these items? Are you claiming that that was because of your sex or gender?

A: I don't know what you really want because you're going to say, well, this does not qualify. The intention is based on race, sex, age, hostile, everything. It was a terrible working environment, and it is way low, low, low quality working environment. The staff treat you as a second class citizen.

Q: Okay. So just so I'm clear, you're claiming that you were not paid these items that are listed on the second page of Exhibit 2 because of race discrimination, sex discrimination, age discrimination, and as a result of a hostile environment?

A: And

Q: Is that a yes?

A: Yes. And they just don't want to pay me. They don't pay attention to me, and they just don't like me. It's completely different from my new job. Everybody love me. It's just a terrible, terrible, working environment. I can cry the rest of my life.

(Def. App. 51). Although Wang fails to identify the statutory bases for these discrimination claims, Prudential assumes that they are being brought pursu-

ant to Title VII, § 1981, and/or the ADEA. On February 27, 2007, Prudential filed a supplemental motion for summary judgment seeking the dismissal of Wang's remaining claims in this case. That motion is now ripe for adjudication.

## III. Analysis

### A. Summary Judgment Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.*

The burden is on the summary judgment movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.; Little,* 37 F.3d at 1075.

Once the movant has met its burden, the non-movant must show that summary judgment is not appropriate. *Little,* 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . .

by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita,* 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the non-movant, and the evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5th Cir. 2000); *Anderson*, 477 U.S. at 248.

B. Failure to File a Charge Within 300 Days of Discriminatory Act

Prudential first argues that any compensation-based claims Wang is bringing pursuant to Title VII and the ADEA should be dismissed because Wang failed to timely file a charge of discrimination with respect to such claims. To support a claim for relief under Title VII or the ADEA, a plaintiff must file a charge of discrimination within 300 days of the alleged discriminatory action. 42 U.S.C. § 2000e-5(e) (Title VII); 29 U.S.C.§ 626(d)(2) (ADEA); *Tillison v. Trinity Valley Elec. Co-op., Inc.*, 204 Fed. Appx. 346, 348 (5th Cir. Oct. 23, 2006). Wang filed her charge of discrimination on July 25, 2005. She is thus barred from complaining about any actions that occurred prior to September 28, 2004, 300 days before July 25, 2005. Virtually all of the actions of which Wang is complaining occurred prior to September 28, 2004. The only discernible action that clearly occurred after this date was the cancellation of Wang's stock options

upon her termination on October 8, 2004.[1] Accordingly, the Court finds that all of Wang's Title VII and ADEA claims arising out of actions which took place prior to September 28, 2004 are untimely and must be dismissed.

C. Failure to Exhaust Administrative Remedies

Prudential next argues that Wang is barred from bringing compensation-based age, race, or sex discrimination claims under Title VII or the ADEA because she failed to exhaust her administrative remedies by including those claims in her EEOC Charge. In the Fifth Circuit, a plaintiff must exhaust remedies by filing a charge of discrimination with the EEOC prior to filing a civil action. *See Dollis v. Rubin,* 77 F.3d 777, 781 (5th Cir. 1995). The central purpose of the exhaustion requirement is to allow the agency to fully inquire into and attempt to resolve discrimination claims. *See Clayton v. Rumsfeld,* 106 Fed. Appx. 268, 271 (5th Cir. Aug. 4, 2004). While the resulting suit is not limited to the specific complaints contained in a Charge, the suit is limited by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination. *See Fine v. GAF Chem. Corp.,* 995 F.2d 576, 578 (5th Cir. 1993). In the Charge filed by Wang on July 25, 2005, Wang only checked the box for age discrimination but not for any other type of discrimination. In the Fifth Circuit,

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[1] Prudential has established under the terms of Prudential's stock options program that employees terminated for cause are not allowed to exercise stock options after the date of their termination. (Def. App. 7). Because Wang was terminated for cause — for falsifying information on a client's insurance application — Wang was not entitled to exercise her options. (*Id.*).

"the crucial element of a charge of discrimination is the *factual* statement contained therein." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970) (emphasis in original). In her factual statement, Wang states only that she was discriminated against on the basis of her age in violation of the ADEA. The statement indicates that her age claim is premised on the fact that a younger Prudential insurance agent was allowed to advertise as an automobile agent in the Asian Gazette newspaper while she was not allowed to do so. The Court finds that no claim of any type of discrimination arising from a failure to properly compensate or reimburse Wang could reasonably be expected to grow from Wang's EEOC Charge. Accordingly, Wang's remaining claims under Title VII and/or the ADEA should be dismissed on the additional ground that she failed to exhaust administrative remedies with respect to those claims.

D. Wang Has Failed to Raise a Fact Issue on Her Compensation-Based Claims

To the extent that any of Plaintiffs compensation-based claims remain, the Court finds that Wang has failed to offer competent summary judgment evidence showing that Prudential treated her any differently than other similarly situated employees outside of her protected class with respect to its compensation and reimbursement policies. Thus, Wang has failed to establish even a prima facie case of discrimination. *See Okoye v. Univ. of Texas Houston Health Sci. Ctr.*, 245 F.3 d 507, 512-13 (5th Cir. 2001). Nor has Wang presented competent summary judgment evidence raising a fact issue as to whether Prudential's legitimate non-discriminatory reasons for making its compensation-related decisions were merely a pretext for

unlawful discrimination or that Wang's protected characteristics were a motivating factor in making those decisions. *See Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). For these additional reasons, Prudential is entitled to summary judgment on Wang's remaining claims.

III. Conclusion

For the reasons stated above, the Court GRANTS Defendant's Motion for Summary Judgment on Plaintiffs Remaining Claims (doc. 114). Wang's claims against Prudential for failing to properly compensate and/or reimburse her based on race, sex, and/or age discrimination are accordingly DISMISSED with prejudice.

SO ORDERED.

April 20th, 2007

/s/ Jane J. Boyle
JANE J. BOYLE
United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

---

Civil Action No. 3:05-CV-2091-B

---

JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORP., PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a PRUDENTIAL INSURANCE COMPANY, AND RICHARD TRETA,

*Defendants.*

---

ORDER

Before the Court is Plaintiffs Motion to Amend Her Pleadings (doc. 59). Defendants do not oppose the motion. Accordingly, the motion is GRANTED. Plaintiff is ORDERED to electronically file her Second Amended Complaint within three days of the date of this order.

SO ORDERED.

SIGNED September 13, 2006

/s/ Jane J. Boyle
JANE J. BOYLE
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

---

Civil Action No. 3: 05-CV-2091-B

---

JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORP., PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a PRUDENTIAL INSURANCE COMPANY, AND RICHARD TRETA,

*Defendants.*

---

ORDER

Before the Court is Plaintiffs motion for an extension of time to file a response to the Defendants' motion for summary judgment (doc. 78)[1]. Plaintiff seeks a one-week extension. The Court GRANTS the motion Plaintiff shall file her response to Defendants' summary judgment motion and all supporting evidence on or before November 13, 2006.

SO ORDERED.

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[1] It appears as though Plaintiff filed an identical motion for an extension on October 31, 2006 (doc. 74), which is unsigned. The Clerk is directed to strike the October 31 motion from the docket. Also on October 31, Plaintiff filed a "Motion to Response to the Defendants' Summary Judgment (doc. 76). This document appears to be a version of Plaintiffs response to Defendants' summary judgment motion, as opposed to a motion in its own right. The Clerk is therefore directed to make the appropriate correction to the docket sheet.

SIGNED November 2, 2006

/s/ Jane J. Boyle
JANE J. BOYLE
United States District Judge

**APPENDIX F**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed 5/14/2008]

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No. 07-10534

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JUDY WANG,
*Plaintiff - Appellant*

v.

PRUDENTIAL FINANCIAL CORPORATION; PRUDENTIAL INSURANCE COMPANY OF AMERICA, doing business as Prudential Insurance Company; RICHARD TRETA
*Defendants – Appellees*

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Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 2/26/08, 5 Cir., _____, _____, F.3d _____

Before HIGGINBOTHAM, STEWART and ELROD, *Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en bane, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

## APPENDIX G

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

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Civil Action No. 3:05-CV-2091-B

---

JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORP., PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a PRUDENTIAL INSURANCE COMPANY, AND RICHARD TRETA,

*Defendants.*

---

ORDER

The Court DENIES Plaintiff's Motion for Reconsideration (doc. 88) of this Court's December 13, 2006 Memorandum Order granting the Defendants' motion for summary judgment and motion for partial dismissal.

SO ORDERED.

SIGNED January 5, 2007.

/s/ Jane J. Boyle
JANE J. BOYLE
United States District Judge

## APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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Civil Action No. 3:05-CV-2091-B

---

JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORP., PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a Prudential Insurance Company, AND RICHARD TRETA,

*Defendants.*

---

FINAL JUDGMENT

In accordance with the Court's memorandum orders of December 13, 2006 and April 20, 2007 granting Defendants Prudential Financial Corp., Prudential Insurance Company of America d/b/a Prudential Insurance Company and Richard Treta's Rule 12(b)(6) Partial Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted, Motion for Summary Judgment, and Motion for Summary Judgment on Plaintiffs Remaining Claims, it is ORDERED, ADJUDGED, and DECREED that Plaintiff Judy Wang take nothing on her claims against Defendants Prudential Financial Corp., Prudential Insurance Company of America d/b/a Prudential Insurance Company, and Richard Treta's and that all of Plaintiffs claims be, and they are hereby, DISMISSED with prejudice. Costs shall be assessed

against Plaintiff in accordance with Rule 54(d), Federal Rules of Civil Procedure.

SO ORDERED.

SIGNED April 20, 2007

/s/ Jane J. Boyle
JANE J. BOYLE
United States District Judge

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed SEP 15, 2006]

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Civil Action No. 3-5CV2091-B

---

JUDY WANG,

*Plaintiff,*

v.

PRUDENTIAL FINANCIAL CORPORATION, PRUDENTIAL INSURANCE COMPANY OF AMERICA, d/b/a PRUDENTIAL INSURANCE COMPANY and RICHARD TRETA,

*Defendants.*

---

PLAINTIFF'S SECOND AMENDED COMPLAINT

---

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Judy Wang, Plaintiff, pro se, and makes and with leave of Court first requested and obtained, makes and files this her Second Amended Complaint herein and would show the Court therefor as follows:

I.

This Court has jurisdiction and venue by pleadings already on file herein, and Plaintiff adopts her pleadings regarding jurisdiction herein already made and incorporates them herein by reference.

II.

Plaintiff was employed by Prudential Financial Corp., Prudential Insurance Company of America

d/b/a Prudential Insurance Company from September 13, 1999, as a common law employee and was promoted from a "Common Law employee" to a full time "Statutory Agent"/"Statutory Employee" (for which Plaintiff was duly licensed, registered, appointed and approved by Defendant) by written contract between the parties effective on December 29, 2003, and was thereafter wrongfully terminated from her said employment by Defendant on October 8, 2004, to Plaintiffs damage, further Defendant's action in terminating Plaintiff not only was a breach of her contract to Plaintiff's damage but was also done in violation of good faith and fair dealing and in a malicious manner with apparent intent to humiliate and embarrass Plaintiff, wrongfully taking Plaintiffs valuable personal property to Plaintiff's damage, and in violation of her rights to be free from hostile working environment, age, sex, and/or race discrimination, for which Plaintiff also seeks exemplary damages against Defendant, further Defendant has failed and refused to pay Plaintiff her earnings, entitlements, benefits, commissions, stock options, 401K 4% contribution plan, health, dental and life insurance, and education assistant program, continuing, new and review business commissions, loss of pending potential, million-dollar insurance contracts;, annuities, "401K roll-over" business, and earned bonuses, and home, life, property and casualty, "group benefit program and ESOP benefit project and 1200 business leads and 2-weeks of pending appointments, to which Plaintiff is and was then rightly and justly entitled to the benefit from, all to Plaintiff's damage (actual, reasonably anticipated and also emotional) and damage of mental distress, all in a sum in excess of the minimum jurisdictional amount herein, for which she seeks damages against Defendant.

III.

After said termination Plaintiff continued her education and study at her own expense and received the certification/designation as, and now is, a Chartered Financial Consultant (ChFC).

IV.

This suit has been filed, after Defendant's internal remedy procedure, within the 180 day period provided for in Uniform Employment Termination Act

WHEREFORE, premises considered Plaintiff prays that upon final hearing herein she have judgment against Defendant for her actual damages in a sum exceeding the minimum jurisdictional amount, and for exemplary damages and for interest thereon at the lawful legal rate, for her costs of Court and her attorneys fees previously required herein in the sum of $10,000.00, and that she be reinstated (including her now obtained through post-termination education and study) as a Chartered Financial Consultant (ChFC) as an employee of Defendant, together with her benefits and salary, commission, bonus, and other entitlements and stock options to which she may show herself justly entitled, and for general relief.

Respectfully submit,

_____/s/_____
Judy Wang, Plaintiff pro se
P.O. Box 15632,
Fort Worth, TX 76119
Ph. 817- 475-4783

A copy of the above and foregoing pleading, Plaintiffs Second Amended Complaint, was hand-delivered or sent by U.S. Mail postage prepaid to the attorney of

Record for Defendant this 8th day of September, 2006, addressed to:

Thomas E. Reddin, Attorney at Law
1201 Elm Street, #1700 Renaissance Tower
Dallas, Texas, a75270

_____/s/_____
Judy Wang Plaintiff, pro se

## APPENDIX J

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

[Filed 9/8/2006]

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Civil Action No. 3-05CV2091-B

---

JUDY WANG,

*Plaintiff,*

vs.

PRUDENTIAL FINANCIAL CORPORATION, PRUDENTIAL INSURANCE COMPANY OF AMERICA, d/b/a PRUDENTIAL INSURANCE COMPANY and RICHARD TRETA,

*Defendants.*

---

### PLAINTIFF'S MOTION TO AMEND HER PLEADINGS

---

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Judy Wang, Plaintiff, pro se, and makes and files this her Motion to Amend her Pleading herein and would show the Court therefor as follows:

I.

Plaintiff's attorney herein, Raul H. Loya, filed Plaintiff's original petition and an amended Petition herein, but failed to properly state Plaintiff's full complaint, and said attorney has withdrawn from this case and no longer represents this Plaintiff. Plaintiff has reviewed the pleadings on file for her in this case and finds that it is necessary and desirable

to amend her original complaint herein and attaches thereto her "Second Amended Complaint", which she now seeks permission of the Court to file

II.

This Motion is not made merely to delay this case but in order that justice may be done and that Plaintiff's case and cause of action be properly stated for the Court and considered. The Scheduling Order herein dated February 17, 2006, provides that this Motion may be filed by September 8, 2006, and today is September 8, 2006, thus this Motion is timely filed and will not delay this case. Said "Scheduling Order" further provides that all discovery is to be completed by January 16, 2007, thus Defendant and Plaintiff have sufficient time within the time scheduled to complete their discovery, and will not be delayed by allowing Plaintiff to file her said Second Amended Complaint herein.

WHEREFORE, premises considered Plaintiff respectfully moves the Court to grant this her Motion to amend her pleading herein and to file her "Second Amended Complaint" which is attached hereto.

Respectfully submitted,
_____/s/_____
Judy Wang, Plaintiff, pro se
P.O. Box 15632
Fort Worth, TX.76119

A copy of the above and foregoing pleading was hand-delivered or sent by U.S. Mail postage paid to the attorney of Record for Defendant this 8th day of September, 2006, addressed to:

Thomas E. Reddin, Attorney at Law
1201 Elm Street, #1700 Renaissance Tower
Dallas, Texas, a75270

_____/s/_____
Judy Wang, Plaintiff, pro se

I certify that I have conferred by telephone on Sept ember 7, 2006 on this motion, with Counsel for Defendant, Thomas E. Reddin, on this matter and that said Thomas e. Reddin, objects to this motion.

_____/s/_____
Judy Wang, Plaintiff, pro se

**APPENDIX K**

IN THE UNITED STATES DISTRICT COURTS
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 11/1/2006]

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Civil Action No. 3-5CV2091-B

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JUDY WANG,

*Plaintiff,*

vs.

PRUDENTIAL FINANCIAL CORPORATION, PRUDENTIAL INSURANCE COMPANY OF AMERICA, d/b/a PRUDENTIAL. INSURANCE COMPANY and RICHARD GRETA,

*Defendants.*

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PLAINTIFF'S MOTION TO EXTEND OF TIME FOR A WEEK TO FILE A RESPONSE TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION (LR 7.3)

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TO THE HONORABLE JANE J. BOYLE UNITED STATES DISTRICT JUDGE

COMES NOW, the plaintiff, Judy Wang files this her Plaintiff's motion to extend the filing time for a week to response to the Defendant's Summary Judgment and Brief in Opposition on October 11, 2006 and would show the Court the following:

Defendants' motion FOR Summary Judgment was filed far away from 90 DAYS OF THE TRIAL SETTING which is April, 2007. There is plenty of

time for the completion of the Discovery findings. (LR 56.2(a). PLAINTIFF IS NOT IN THE LEGAL PROFESSION AND REQURES EXTRA TIME FOR THE LEGAL SEARCH.

List of Expert witnesses is due on 10/31/2006 which is the same date for this reply.

ENGLISH AS SECOND LANGUAGE THAT THE PLAINTIFF REQURES ADDITIONAL TIME FOR REASONABLE ACCOMMODATION AS THE PLAINTIFF TAKES THE LICNESES EXAMINATIONS DUE TO ESL SPECIAL ACCOMMODATION.

Plaintiff's legal coach, Joe Orr, attorney at law, his son is getting married on Nov. 3rd 2006, which is a few days away.

EEOC has lost Plaintiff's files and is still looking for which should include the letter sent by Plaintiff to the Director Michael Fezel on 81312005 (Exhibit A, which date was 10 days after the Plaintiff obtained the first "Right to Suit Letter which was Issued at the same time and delievered in person not by mall), the minutes with Director Fetzer and Investigator, Azella L. Dykman, at Dallas District Office, 207 S. Houston St. 3rd Floor, Dallas, TX 75202 after presenting the letter in person. The contents included the charges of Sexual Harassment, Race, Age, and Compensation Discrimination, also Hostile working Environment, etc. Plaintiff did not receive a "New Determination Letter" after the new additional charges. Plaintiff was also counseled by the other counselor after 7/25/2005 and and was told that there was no need for the second "Right to Suit letter" for the Race/Color and Compensation Discrimination, etc. One letter would be enough.

"A Charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter. The original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred." §1601.12 Contents of charge; amendment of charge.

> Code of Federal Regulations Title 29: Labor PART 1601—PROCEDURAL REGULATIONS. Plaintiff had demonstrated the fully exhausted the Administrative Remedies and filed the claims of Sexual Harassment, Race, Age, and Compensation Discrimination, also Hostile working Environment, etc. after the new additional charges to be appealed and be amended.

(Exhibit B)

There is lack of communication between PLAINTIFF AND FORMER LEGAL COUNSEL, RAWL LOYA WHO IS STILL WITHHOLDING SOME OF THE PLAINTIFF'S ORIGINAL DOCUMENTS OF EVIDENCE. AT THE TIME OF LOYA'S WITHDRAW, PLAIN line WAS NOT AWARE THE OTHER PAPERS AND ONLY READ THE LAST TWO PAGES PRIOR PLAINTIFF'S SIGNATURE. Plaintiff was not aware of time limitations of legal process.

DEFENDANTS' PRODUCED THE FIRST SET OF PRODUCTION ON OCTOBER 11, 2006 THAT PLAIN-TIFF DID NOT HAVE ADQUATE TIME FOR THE INSPECTION OF DOCUMENTS AND REPONSE.

DEFENDANTS STILL FAILED TO PRODUCE "EMPLOYEE HANDBOOK" AND "TERMINATION PROCEDURE" ALONG WITH THE OTHER IMPORTANT POSESSIONS AS EVIDENCE,

Respectfully submitted
_____/s/_____
Judy Wang, ChFC
P.O. Box 15632,
Fort Worth, TX 76119
PLAINTIFF, pro se

CERTIFICATE OF SERVICE

A copy of the above motion was delivered by UPS. Mail postage paid to the attorney of record for Defendants addressed: Thomas E. Reddin, GODWIN PAPPAS LANGLEY RONQUILLO, LLP, 1700

05

(2)

No. 08-174

Supreme Court, U.S.
FILED
SEP 10 2008
OFFICE OF THE CLERK

# In The Supreme Court of the United States

JUDY WANG,

*Petitioner,*

v.

PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

THOMAS E. REDDIN
*Counsel of Record* (Motion for Admission Pending)

DAVID F. JOHNSON
*Additional Counsel*
WINSTEAD PC
5400 Renaissance Tower
1201 Elm Street
Dallas, TX 75270
Telephone: (214) 745-5400
Facsimile: (214) 745-5390

*Counsel for Prudential Financial Corporation and Prudential Insurance Company of America, D/B/A Prudential Insurance Company*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

1. A party must file a motion for continuance showing diligence in seeking an extension to file a response to a summary judgment. The district court granted Wang's only motion for continuance regarding her response to Prudential's first motion for summary judgment. Did the district court err in failing to *sua sponte* extend Wang's time to file an additional response after Wang filed her response and never requested a second extension?

2. A party must plead some facts to support the elements of a claim. Wang did not plead any facts that would support an Equal Pay Act ("EPA") or state law conversion claim. Did the district court err in granting Prudential a final judgment after granting Prudential's summary judgment motions that covered all of Wang's pleaded claims?

3. A party waives a complaint unless it timely raises it in the district court and in the court of appeals. Wang failed to raise any complaint about the timing of her response to Prudential's first motion for summary judgment or the finality of the district court's order in either the district court or Fifth Circuit Court of Appeals. Did Wang waive the complaints in her Petition for Writ of Certiorari?

## PARTIES TO THE PROCEEDINGS

Petitioner is Judy Wang.

Respondents are Prudential Financial Corporation, and Prudential Insurance Company Of America, D/B/A Prudential Insurance Company. Respondents are not related to any other publicly held or publicly-traded companies.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Prudential Financial Corporation, and Prudential Insurance Company Of America, D/B/A Prudential Insurance Company (hereinafter collectively "Prudential") respectfully submit this Brief in Opposition to the Petitioner Judy Wang's Petition For Writ of Certiorari.

## I. STATEMENT OF THE CASE

### A. Summary of the Argument

This honorable Court should deny Wang's Petition because the Court of Appeals' decision affirming the district court's rulings is unremarkable under the facts of this case. The court of appeals' opinion did not conflict with this Court's prior opinions or those of any sister court of appeals. It is also not precedent as it is an unpublished opinion that does not discuss any legal or factual issue. This Court's resources are better served on other cases dealing with important legal issues.

If a party desires to extend the time to file a response to a summary judgment motion, that party has a duty to request an extension and explain why it is needed, the evidence to be discovered, and why the evidence has not already been discovered. The district court in this case granted Wang's only request for a continuance regarding her response to Prudential's first motion for summary judgment. The district court

did not abuse its discretion in accepting Wang's response, which was timely filed, and not *sua sponte* granting an extension to file an additional response.

Waiver principals serve an important function in our legal system. A party should not be able to "lay behind the log" and raise complaints for the first time in this Court without giving the district court and court of appeals an opportunity to consider them. Wang did not raise either issue in her Petition for Writ of Certiorari with the district court or the Fifth Circuit Court of Appeals. This Court should deny Wang's Petition.

## B. Statement of Facts

### 1. Prudential Terminated Wang's Employment For Conducting A Transaction That Violated Conflict Of Interest Rules

Prudential employed Wang as an insurance agent until her termination on October 8, 2004 (C.R. 488). Pursuant to a Statutory Agent Agreement, she was not employed for any definite period of time and her employment was terminable at-will by either Wang or Prudential (*Id.*). Prudential terminated Wang after an investigation revealed that she had effected the change of ownership on a client's life insurance policy naming her own son as the policyholder and beneficiary after misrepresenting her son to be the "adopted son" of the insured (*Id.*). Prudential concluded that not only did Wang's actions in this regard cause a

potential for conflict of interest, but her misrepresentation of her son's relationship to the insured did not allow Prudential's Underwriting Department to properly determine if there was an insurable interest for the policy (C.R. 488-489). Prudential did not terminate Wang for any impermissible reason.

### 2. Wang Sued Prudential and Treta for Various Employment Related Claims

Wang initially sued Prudential and Treta, her supervisor, for alleged violations of the Age Discrimination in Employment Act of 1967 ["ADEA"]; Title VII (race discrimination, racially hostile work environment, and retaliation); 42 U.S.C. § 1981; the Texas Commission on Human Rights Act, Texas Labor Code Chapter 21 ["TCHRA"]; and common-law causes of action for intentional infliction of emotional distress, negligent supervision, retention and training, and defamation (C.R. 20).

### 3. District Court Dismissed Some of Wang's Claims Under Rule 12(b)(6)

Prudential and Treta filed a motion for partial dismissal under Rule 12(b)(6) alleging that some of Wang's claims in her original complaint should be dismissed (C.R. 62). Wang filed a response and stipulated that some of her claims were meritless and otherwise did not respond to other arguments (C.R. 94-103). Accordingly, on May 25, 2006, the district

court issued an order granting in part Defendants' Rule 12(b)(6) partial motion to dismiss and dismissed with prejudice Wang's claims against Treta, individually, under the ADEA, Title VII and the TCHRA; against Prudential for Title VII race discrimination and retaliation; against Prudential under the TCHRA, "disparate impact" as a basis for any claim; and the claim for intentional infliction of emotional distress (C.R. 300-304).

### 4. Wang Amended Complaint and Prudential Filed An Initial Motion For Summary Judgment and Motion To Dismiss

Shortly after the district court issued its order, Wang filed her First Amended Complaint asserting claims against Prudential for age discrimination under the ADEA and Section 21 of the Texas Labor Code, for race discrimination, disparate treatment, and hostile work environment under 42 U.S.C. § 1981, against Prudential and Treta and for negligent supervision, negligent retention, and defamation against both Defendants (C.R. 305). With Wang's consent, her counsel withdrew his representation on August 29, 2006, and Wang proceeded *pro se* (C.R. 392).

On September 15, 2006, Wang filed a Second Amended Complaint and asserted that Prudential wrongfully terminated her and in so doing breached her contract, breached a duty of good faith and fair

dealing, and violated "her rights to be free from hostile work environment, age, sex, and/or race discrimination" (C.R. 446). Wang failed to identify the specific statutory bases for these claims in her Second Amended Complaint (*Id.*). The Second Amended Complaint did, however, incorporate by reference the jurisdictional and venue averments contained in the First Amended complaint, which, in turn, referenced 42 U.S.C. § 1981, the ADEA, and Section 21 of the Texas Labor Code (*Id.*). In her Second Amended Complaint, Wang also alleged that Prudential failed to pay her certain earnings, benefits, and commissions to which she claimed entitlement (*Id.*).

The Second Amended Complaint did not allege an Equal Pay Act ("EPA") claim because it did not allege any legal claim or facts that would support such a claim – that Wang was paid less than male agents for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Moreover, the Second Amended Complaint did not allege a state law conversion claim because it did not allege the legal claim or facts that were necessary to sustain each element of the claim.

On September 22, 2006, Prudential and Treta filed a partial motion to dismiss under Rule 12(b)(6) seeking to dismiss all potential claims asserted against Treta in his individual capacity in this lawsuit as well as the breach of the duty of good faith and fair dealing claim against Prudential (C.R. 455). On October 11, 2006, Prudential and Treta filed an

initial motion for summary judgment seeking the dismissal of Wang's claims for breach of contract, breach of the duty of good faith and fair dealing, and all of her discrimination-based claims (C.R. 462).

Wang filed a motion for a seven-day continuance to file her response. The district court granted that motion. Wang then timely filed a response to the summary judgment motion but failed to file any competent summary judgment evidence such as an affidavit or authenticated documents (C.R. 580, 723). Prudential objected to the competency of portions of Wang's purported evidence (C.R. 725). Wang never filed an additional motion for continuance regarding her response to Prudential's first motion for summary judgment.

### 5. Court Granted Motion To Dismiss and Initial Motion For Summary Judgment

In a comprehensive and well-reasoned opinion, the district court granted Prudential's and Treta's motion to dismiss and initial summary judgment motion (C.R. 732). The court dismissed with prejudice Wang's claims against Prudential for breach of contract, breach of the duty of good faith and fair dealing, for hostile work environment and for age, sex, and/or race discrimination under the ADEA, Title VII, and 42 U.S.C. § 1981 (*Id.*). Wang's remaining claims against Defendant Treta were also dismissed with prejudice (*Id.*).

In its order, the court noted that Prudential and Treta did not move to dismiss Wang's compensation-based claims and directed both parties to file a report describing whether Wang would pursue those claims, and if so, whether Prudential and Treta would file a supplemental dispositive motion (C.R. 745).

Prudential filed a report that indicated that it believed that Wang's compensation-based claims were solely claims for remedies based on alleged acts of discrimination or breach of contract, which the court had already dismissed (C.R. 746-748). It requested that the court reconsider and enter a final summary judgment, but in the alternative, it indicated that it would file a supplemental dispositive motion (C.R. 748).

After Wang submitted her report, the court ordered Wang to file an additional statement clarifying the basis for her compensation claims and only to list claims that had not been previously dismissed (C.R. 971). Wang then filed a document that clarified her remaining compensation-based complaints (C.R. 986). Significantly, Wang did not assert that she was attempting to bring an EPA or state law conversion claim (*Id.*).

Subsequently, Prudential deposed Wang, and in that deposition, Wang clarified that she based all of her compensation claims on discrimination (C.R. 1212). Therefore, all that potentially remained was Wang's discrimination-based claims concerning Prudential's alleged failure to pay her certain earnings,

benefits, and commissions to which she allegedly became entitled during her tenure with the company.

### 6. Prudential Filed A Supplemental Motion For Final Summary Judgment, and District Court Granted It

Prudential filed a supplemental motion for summary judgment seeking the dismissal of Wang's remaining discrimination-based compensation claims (C.R. 1129). On April 20, 2007, the court dismissed with prejudice Wang's claims and entered Final Judgment (C.R. 1384, 1391). Wang did not file a post-trial motion whereby she complained that the district court's order was not final because she had an EPA claim or a state law conversion claim that were not addressed by Prudential's motions for summary judgment. Wang filed her notice of appeal (C.R. 1393).

### 7. Fifth Circuit Court of Appeals Affirmed District Court's Rulings

Wang's Appellant's Brief was confusing and difficult to understand. However, it is clear that among her myriad of complaints, she did not complain that the district court erred in refusing to give her more time to file a response to Prudential's first motion for summary judgment, and she did not complain that the district court's judgment was not final because she had an EPA or state law conversion claim that had not been addressed by Prudential's motions for summary judgment. Prudential filed a

response and explained the propriety of the district court's orders and judgment and also alleged a reply point that Wang had waived her appeal due to inadequate briefing. The Fifth Circuit affirmed the district court's judgment without explanation in an unpublished opinion.

## II. REASONS THE PETITION SHOULD BE DENIED

### A. This Case Does Not Present Issues Worthy Of Granting Certiorari

This Court should exercise its jurisdiction to review judgments of courts of appeals sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision. *See In re Lau Ow Bew*, 141 U.S. 583, 587 (1891). There are two main reasons to confer jurisdiction on this Court to hear cases by writs of certiorari from courts of appeals: to secure uniformity of decision between those courts and to bring up questions of importance which it is in the public interest to have decided by the court of last resort. *See Magnam Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Where a case does not present a conflict or a question of grave importance, this Court should normally not accept a petition. *See Fields v. United States*, 205 U.S. 292, 296 (1907).

The Court should not grant Wang's Petition for Writ of Certiorari because this case does not involve any conflict between the Fifth Circuit and any of its sister courts of appeals or any conflict with this

Court's precedent. This case also does not involve a legal issue of grave importance. Rather, Wang's first issue is whether the district court abused its discretion in not *sua sponte* giving Wang a second extension to file a summary judgment response when Wang never requested a second extension. Wang's second issue is whether the district court erred in rendering a final judgment where Wang's complaint did not state facts that would support necessary elements of alleged claims that were not included in Prudential's motions for summary judgment. This Court should not grant a petition to resolve factual issues. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951). Moreover, as shown below, there are multiple instances of waiver by Wang that require the affirmance of the lower courts' decisions. This Court should not grant a Petition to review an issue not considered below. *See McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945).

Finally, the lower courts' opinions do not set forth any incorrect precedent on the issues raised by Wang in this Petition. Rather, the Fifth Circuit's opinion in this case is not published and contains no discussion of any issues. It is not precedential. Moreover, because Wang did not raise her issues below, the lower courts' opinions do not address a second extension of time to file Wang's summary judgment response or the disposition of judgment notwithstanding any alleged remaining EPA or state law conversion claim. Accordingly, this Court should not expend its valuable, and limited, resources on this case.

### B. The Lower Courts' Opinions Were Correct In Dismissing Wang's Claims

#### 1. District Court Did Not Abuse Its Discretion In Failing To *Sua Sponte* Grant Wang A Second Continuance To File Her Response To Prudential's First Motion for Summary Judgment

The district court did not abuse its discretion in failing to *sua sponte* grant Wang a second continuance regarding her response to Prudential's first motion for summary judgment. The standard of review over a district court's ruling on a motion for continuance is an abuse of discretion. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Adams v. Travelers Indemnity Co.*, 465 F.3d 156, 162 (5th Cir. 2006). After Prudential filed its first motion for summary judgment, Wang filed a motion for continuance. The district court granted that motion and gave Wang all the time requested. Wang then filed a response and did not seek any further extension of time. The district court did not abuse its discretion in failing to *sua sponte* give Wang relief that she never requested. *See White Consol. Indus. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 411-12 (6th Cir. 1999) (nonmovant waives appellate complaint about need for more time to respond to summary judgment motion by failing to raise issue with district court).

Even if Wang had filed a second motion for continuance, the district court would not have abused its discretion in denying it. In seeking a continuance,

a party must show diligence in securing discovery. *See Kozikowski v. Toll Bros.*, 354 F.3d 16, 26 (1st Cir. 2003); *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196-97 (6th Cir. 1995). Having not sought a second continuance, Wang did not make any showing of diligence.

Further, the record indicates a complete lack of diligence on Wang's part. Wang filed this suit on October 24, 2005 (C.R. 20). On February 17, 2006, the district court entered a scheduling order pursuant to Federal Rule of Civil Procedure 16 (C.R. 190). Wang did very little to prosecute this case (C.R. 418-419). On August 25, 2006, Wang and her counsel filed a motion to allow her counsel to withdraw (C.R. 392). In that motion, she specifically stated that allowing the withdrawal would "not disrupt the suit" (C.R. 393). Wang signed the motion to withdraw and adopted this representation (C.R. 394). Based on this motion, the district court allowed the withdrawal on August 29, 2006 (C.R. 400-401). Wang complains throughout her Petition about not having an attorney, yet she represented to the district court that such would not delay or disrupt the suit.

Wang only served limited discovery, which was subsequently stricken by the district court, and did not notice any depositions (C.R. 419). Wang did little more in the approximate one year the suit was on file than simply file her complaint and amend it. There was no showing of any diligence. Wang did not allege or provide evidence concerning how long she had requested the EEOC's file. Wang also failed to allege

or prove any harm or detriment to her case if the district court did not *sua sponte* grant her a second extension.

Finally, a party seeking a continuance to allow more time to file a response to a summary judgment motion must support the request for a continuance with an affidavit. *See Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006). Wang did not support her motion for continuance with an affidavit, and her response to Prudential's summary judgment motion did not have any proof regarding her attempts to secure the EEOC's file. Accordingly, the district court did not abuse its discretion in not granting Wang an extension that was never sought by Wang regarding her response to Prudential's first motion for summary judgment. The court of appeals did not err in affirming the district court's judgment.

### 2. District Court Did Not Err In Granting Final Judgment

The district court did not err in entering a final judgment because Prudential's motions for summary judgment addressed all of Wang's pleaded claims. In this Court for the first time, Wang complains that the district court's judgment was not final because she still had EPA and state law conversion claims outstanding. That is not true because she never pled those claims.

Under Federal Rule of Civil Procedure 8(a), the plaintiff must give the defendant fair notice of the

nature of her claims and the ground for them. *See Erikson v. Pardus*, 127 S.Ct. 2197, 2200 (2007). To give fair notice, a complaint must give a short and plain statement of the claim, which must include some factual allegations concerning all material elements of a viable theory of recovery. *See Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929, 940, 2007 U.S. LEXIS 5901, *21 (2007). As this Court recently stated:

> While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out in detail the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. *See* 5 WRIGHT & MILLER § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

*Id.* Wang failed to meet this requirement concerning an EPA claim or a state law conversion claim. As noted by the district court, Wang's filings have consistently been "confusing, diffuse, disordered, and, in many ways, incoherent" (C.R. 742).

Wang's Second Amended Complaint stated no factual basis for her discrimination claims and alleged no facts that would support an EPA claim: that she was compensated less than an equivalent male employee for performing equal work (C.R. 446-447). *See* 29 U.S.C. § 206(d). Moreover, her Second Amended Complaint incorporated the jurisdictional statement of her previous complaint (C.R. 466). The previous complaint expressly listed Title VII, ADEA, and § 1981 but omitted any reference to the EPA (*Id.*). Under any standard of reviewing her Second Amended Complaint, Wang did not raise an EPA claim. In her response to Prudential's supplemental motion for summary judgment regarding the compensation-based claims, she did not cite to the EPA and made no arguments thereunder (C.R. at 1277-1299). Simply stated, Wang did not plead an EPA claim, and the district court did not err in granting a final judgment. Moreover, an EPA claim makes no sense in the context of the facts of this case: Wang was compensated by the same commission rate as all other similarly situated employees.

Wang also did not plead a state law conversion claim. In Texas, the tort of conversion is defined as the unauthorized and wrongful assumption and exercise of dominion and control over the property of

another, to the exclusion of and inconsistent with the owner's rights. *See Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex. 1971). In Texas, to allege a claim for conversion of personal property, a party must establish the following: (a) the plaintiff owned or had possession of the property or entitlement to possession; (b) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (c) the plaintiff demanded return of the property; and (d) the defendant refused to return the property. *See Apple Imports, Inc. v. Koole,* 945 S.W.2d 895, 899 (Tex. App. – Austin 1997, writ denied). Moreover, a party has no claim for conversion based on the loss of unspecified money. *See Hodges v. N. Trust Bank of Tex. N.A.,* 54 S.W.3d 518, 522 (Tex. App. – Eastland 2001, pet. denied).

Wang's Second Amended Complaint does not allege any facts that would support the position that Prudential exercised control over any non-monetary based personal property or that she demanded its return and Prudential refused. Therefore, under any standard for reviewing pleadings, Wang did not allege a state law conversion claim. The district court correctly entered a final judgment in this case because its opinions resolved all outstanding claims between Wang and Prudential.

### C. Wang Waived Her Complaints By Failing To Properly Raise Them With The Lower Courts

#### 1. Wang Waived Any Complaint Regarding The Finality Of The District Court's Judgment By Failing To Raise That Complaint With The District Court

Wang waived any alleged EPA or state law conversion claims at the district court level by failing to complain to that court that the judgment was not final because of her alleged outstanding claims. Judicial efficiency is an important public policy. It is served by requiring parties to preserve their appellate complaints by raising them in the district courts, where if meritful they may be corrected. Efficiency and the justice system are not served by allowing parties to "lay behind the log" and raise issues for the first time on appeal.

Accordingly, a party waives an issue that is not first properly raised to the district court. *See Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006); *In re Quenzer*, 19 F.3d 163, 165 (5th Cir. 1993). Moreover, a party has a duty to inform a district court when it does not resolve an issue in a final judgment. *See Evergreen Invs., L.L.C. v. FCL Graphics, Inc.*, 334 F.3d 750, 757 (8th Cir. 2003); *Hopkins v. Saunders*, 199 F.3d 968, 974-975 (8th Cir. 1999). *See also Moulton v. Vigo County*, 150 F.3d 801, 803 (7th Cir. 1998).

Wang never filed a motion or otherwise complained to the district court that its judgment was improper because it was not final. Wang never informed the district court that she allegedly had outstanding EPA or state law conversion claims that were not disposed of by Prudential's summary judgment motions. If she had raised this complaint, and it was meritful, with which Prudential disagrees, the district court could have easily corrected this error. However, she did not raise this issue in any respect, and she has therefore waived any complaint about the finality of the district court's judgment.

### 2. Wang Waived Complaints Raised In Her Petition For Writ Of Certiorari By Failing To Raise Them With The Court Of Appeals

Wang has also waived her complaint about the timing of her response to the first motion for summary judgment and the finality of the district court's judgment by failing to properly raise them with the court of appeals. Although courts liberally construe briefs of *pro se* litigants, *pro se* parties must still brief the issues and reasonably comply with the requirements of Rule 28 of Federal Rules of Appellate Procedure. *See Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995). An appellant's brief must contain an argument, which in turn must contain her "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." FED. R. APP. P. 28(a)(9). *See Yohey v. Collins*, 985 F.2d

222, 225 (5th Cir. 1993). *See also United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) ("While we construe pro se pleadings liberally, pro se litigants, like all other parties, must abide by the Federal Rules of Appellate Procedure.").

In her appellant's brief in the court of appeals, Wang failed to raise any issue regarding the timing of her response to Prudential's first motion for summary judgment. Further, in her brief, Wang made only vague references to the EPA and never mentioned a conversion claim in any respect. She certainly did not complain about the finality of the district court's judgment. The court of appeals did not have the opportunity to rule on Wang's complaints because Wang failed to brief them. Judicial efficiency is not served by having this Court decide issues never raised in either the district court or the court of appeals. Therefore, Wang waived the issues asserted in her Petition for Writ of Certiorari because she failed to raise them with the court of appeals.

## CONCLUSION

Prudential requests that this honorable Court deny Wang's Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

JUDY WANG,

*Petitioner*,

v.

PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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IN THE

# Supreme Court of the United States

No. 08-174

JUDY WANG,

*Petitioner*,

v.

PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF

Petitioner Judy Wang files this Reply Brief to briefly address Respondents' specious waiver arguments regarding Petitioner's Equal Pay Act and state law conversion claims.[1]

[1] Petitioner will not reassert her arguments regarding the initial pleading of those claims (Pet. For Cert. 6, 17-19) and the "fleshing out" of those claims in her response to Respondents' first Motion for Summary Judgment (Pet. For Cert. 8-9.) Similarly, Petitioner will not repeat her arguments and appellant brief quotations supporting non-waiver of these claims before the Court of Appeals for the Fifth Circuit. (Pet. For Cert. 10.) All

## PETITIONER WANG HAS NOT WAIVED ANY OF HER CLAIMS BEFORE THIS HONORABLE COURT

### I. Wang Asserted an Equal Pay Act Claim in the District Court

Following the erroneous granting of Respondents' first motion for summary judgment, the district court ordered the parties to file a joint statement clarifying Wang's remaining compensation-based claims. (C.R. 732.) After the parties filed separate statements, the trial court ordered Wang to file another statement summarizing her claims. (C.R. 970.) In their Opposition Brief, Respondents state, "Significantly, Wang [in this summary filing] did not assert that she was attempting to bring an EPA or state law conversion claim. (C.R. 986.)" (Opp. Brf. 7.) Nothing could be further from the truth!

On the same page cited by Respondents, Wang stated:

> 'The law against compensation discrimination includes all payments made to or on behalf of employees as remuneration for employment. All forms of compensation are covered . . .' (See Exhibit X).

(C.R. 986.) On Exhibit X, there is a *four (4) paragraph discussion of the Equal Pay Act*, which is also boldly captioned "Equal Pay Act." (C.R. 1019.)

Further, in her summary statement, Wang listed seven (7) specific compensation-based claims left unadjudicated by the district court's order on the first summary judgment motion. Item No. 4 expressly

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these facts and arguments were adequately presented in her Petition for Writ of Certiorari.

asserts an "unpaid earned commission" claim and states, in part, "This [insurance] policy was secretly reassigned to young male Richard Wang [(no relation to Petitioner)] to steal the commission via home computer with private email address [which] *violated EPA*." (C.R. 987 (emphasis supplied).) Wang goes on to state, "Wang did all the work and did not get paid." (Id.)

Clearly such statements point out Wang's purpose and intent to rely on the Equal Pay Act and also state facts asserting such a claim. Moreover, not only were Respondents served with this summary document (C.R. 988), but they actually attached it as an exhibit to their own second motion for summary judgment! (C.R. 1170.) Therefore, assertions in this Honorable Court that Wang never advised the district court that she was asserting claims under the Equal Pay Act are specious, at best.

## II. Wang Even Supported Her Equal Pay Act Claim with Evidence

Not only did Wang assert an Equal Pay Act claim, but she filed admissible evidence regarding that claim as well.

In responding to the district court's order requesting a joint statement regarding her remaining claims (C.R. 732), Wang filed ten (10) "affidavits of fact" with documentary exhibits consisting of a total of 171 pages. (C.R. 754-925.) In Affidavit of Fact I, she described the commission due her and averred that she never received it and that it was, in fact, "transferred secretly to the young male new agent Richard Wang to boost his commission." (C.R. 766) She further averred that this transfer was "one of the proofs of Retaliation. My pay was reassigned to the

other young male agent. It is also the claim for Unequal pay due to Sex discrimination." (C.R. 767.) Finally, she again re-asserted in that affidavit what statute she was suing under:

> Defendant is covered by the EPA. The equal [sic] Pay Act, 29 U.S.C.A. §206(d) defines "Equal Work" as jobs, the performance of which requires equal skill, effort, responsibility and which are performed under similar working conditions. "Wages" is defined as all aspects of compensation as well as the value of "fringe benefits."

(C.R. 768.)

After stating her claims and supplying supporting evidence, Wang also responded to Respondents' second motion for summary judgment with arguments and evidence. (C.R. 1277-1371.) In this response, Wang again argued that "instead [of] paying plaintiff" she was fired and her commission was "secretly reassigned to the much younger Richard Wang." (C.R. 1284.) She repeated and enhanced this argument several pages later. (C.R. 1289.)

Further, not only did she make the arguments, but she also supported them with affidavit evidence. (C.R. 1299.) She averred that in Prudential's policy for reimbursing costs of taking qualification examinations like Series 7 and Series 65, "All the White males . . . were given the higher paying jobs . . . and gave more favorable treatment and were paid [for] Series 7 while they were studying as Financial Associates." (C.R.1309.)

Thus, it could not be clearer that the district court was indeed advised of Wang's Equal Pay Act claims. No waiver of these claims at the district court level occurred.

## III. Wang Asserted State Law Conversion Claims in the District Court

Similarly, Wang apprised the district court of her state law conversion claims on numerous occasions. For instance, in addition to her Second Amended Complaint, on the first page of Wang's response to Respondents' second motion for summary judgment, she stated:

> These claims are to [sic] personal property of Plaintiff, which she owned or had earned and to which she had vested rights before these items of personal property were forcefully and wrongfully taken away from her on the date of her termination by Defendants.

(C.R.1281.) At the conclusion of this introduction, Wang further stated:

> Accordingly, the Court should deny Defendant's said Motion for Summary Judgment, and set this matter for hearing to determine the matters of personal property taken away from Plaintiff by Defendant, which should now be returned and/or restored, to Plaintiff (or compensate Plaintiff therefore with monetary and exemplary damages).

(C.R. 1285.) In fact, Wang even listed the components of her losses as one of the disputed facts:

> 1. The fact the Defendant took from Plaintiff her earned personal property, including:
>
> *a.* Earned commissions
>
> *b. Stock Options*
>
> *c. Personal items/family pictures*
>
> *d.* Compensations
>
> *e.* Fair treatment.

(C.R. 1291 (emphasis supplied.) Finally, in her argument section, Wang stated:

> Plaintiff has valid claims for wrongful taken [sic] by Defendant of Plaintiff [sic] valuable personal property including compensation for work previously completed or commissions earned and for her earned stock options and for her personal items.

(C.R. 1292.)

Just because Wang was *pro se* and failed to use the legal term "conversion" should not be held against her. She pled a wrongful taking of personal property, and she repeated her desire for the return of her "personal property," including stock options and "personal items" and "family pictures." There was no waiver of a state law conversion claim in the district court.[2]

---

[2] Respondents attach some import to Wang's failure to include any mention of a state law conversion claim in her summary of remaining claims filing. (Opp. Brf. 7.) Again, such an argument is totally specious. The district court *ordered* Wang to only include compensation-based claims in this statement, not her personal property conversion claims. (C.R. 970-71.) Indeed, she was expressly precluded from mentioning non-compensation-based claims under the threat of "death-penalty" sanctions:

> Again, the statement should only pertain to any claims Wang may have to certain amounts or benefits that she earned or accrued during her employment with Prudential that have not been paid. Should Wang fail to comply with this order . . . the Court will dismiss her remaining claims with prejudice.

(C.R. 971.)

## IV. Wang Advised the District Court That Some of Her Claims Were Still Not Addressed.

Likewise, Wang did not waive her complaint that her Equal Pay Act and state law conversion claims were not addressed in Respondents' motions for summary judgment. Wang pointed out to the district court in numerous places that Defendants' second motion for summary judgment did not address all of her remaining claims:

1. "There were several claims that Defendant did not address at all. Apparently they are true as a valid claims [sic] and Plaintiff is entitled to have this [sic] claims." (C.R.1290)

2. "There were several claims that Defendant did not address at all. Apparently they are true as a valid claims [sic] and Plaintiff is entitled to have this [sic] claims." (C.R.1291)

3. "There were several claims that Defendant did not address at all. Apparently they are true as a valid claims [sic] and Plaintiff is entitled to have this [sic] claims. Therefore it is only a Partial Summary Judgment." (C.R.1294)

Thus, the district court was made aware that not all of Wang's claims were addressed by Respondents' second summary judgment and that certain of her claims remained to be adjudicated. Therefore, the district court's error in this regard was not waived.

## V. Waiver of the Finality of the Judgment by the District Court is Impossible

Respondents assert that Wang has argued that the district court's judgment is somehow not final. (Brf. Opp. 17-18.) Respondents misconstrue Wang's

arguments. Wang does not contend, nor has she ever contended, that the district court's judgment in this case is not final.[3] Wang contends it was erroneous for the district court to dismiss all her claims when they were not all addressed in Respondents' motions for summary judgment. However, if Respondents are correct, and the judgment is, indeed, not final, then Wang could not have waived anything because jurisdiction of this case remains solely in the district court.

Absent one of the specific appealable interlocutory orders, which is not involved in this case, a non-final judgment is not appealable unless specifically certified by the district court. *See* 28 U.S.C. §1291; Fed. R. Civ. P. 54(b). No such certification occurred in this case. Thus, finality of the judgment in this case is a jurisdictional prerequisite to any appeal. And, it is elemental law that an appellate court's jurisdiction is fundamental, and may not be waived or even conferred by agreement.

Partial summary judgments are not—and never have been—final, appealable judgments. *Liberty Mut. Ins. Co v. Wetzel*, 424 U.S. 737, 744, 96 S. Ct. 1202, 1206 (1976). Thus, if this Honorable Court questions the finality of the judgment at issue, it *must* on its own motion assess the jurisdiction of the Court of Appeals in this case. *Id.* at 740; at 1204-05. And, if this Honorable Court concludes that the Court of Appeals lacked jurisdiction to hear the appeal below, this Court *must* vacate the judgment of the Court of Appeals with instructions to dismiss Wang's appeal; thereby returning this case to the district court. *Id.*

---

[3] The Judgment in this case expressly dismissed all of Wang's claims with prejudice. (Pet. For Cert. 33a).

## CONCLUSION

Contrary to Respondent's assertions, neither of Petitioner's Questions Presented, nor any part thereof, has been waived in the district court or at the Court of Appeals level. Therefore, for all the reasons previously enunciated in Wang's Petition for Writ of Certiorari, this Honorable Court should exercise its supervisory power and grant Wang's Petition for Writ of Certiorari.

Alternatively, this Honorable Court should assess the jurisdiction of the Court of Appeals for the Fifth Circuit in this case and, if found lacking, this Honorable Court should vacate the judgment of the Court of Appeals with instructions to dismiss Wang's appeal and return this case to the district court.

Respectfully submitted,

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PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

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## PETITION FOR REHEARING

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APPENDIX B – Incoming phone call from Prudential's Attorney David Johnson on 10/15/2007, 10.28 am to request the extension. *See* Pet. App. 3a. Defendants failed to file timely.

APPENDIX C – "Development Case Topsheet" from Prudential's Denise Cashman. (C.R. 513-517, PRU00431-432). *See* Pet. App. 4a, 5a.

APPENDIX D – Wang's e-mail to Richard Treta and Bobbie Smith on ***9/19/2004***: "commission with $8400 annual premium was not calculated – V6060183 vs. V6059550". (PRU000997). *See* Pet. App. 5a-7a.

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APPENDIX G – Affidavit of Alexander Cheng Concerning Richard Wang. *See* Pet. App. 12a-14a.

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## GROUNDS FOR GRANTING REHEARING:

Petitioner "Wang," the former employee of Respondents "Prudential," respectfully submits the following in support of her Petition for Rehearing:

### I.

**District court erred in ruling on 9/11/2006, "Plaintiff has failed to show good cause for the continuance she seeks" (C.R.436). The decision wrongfully relied on an assumption of incorrect facts due to the absence of "known concealed facts" and misrepresentation of facts, by Prudential under Wang's surrounding circumstances.**

On 8/24/2006, Wang's "Withdrawal Agreement" with her former attorney Raul Loya was not a "*Mutual Consent.*" When Wang signed the agreement, she was not aware that pages were missing. (C.R.394-395). The missing pages provided that: "The withdrawal of movant as counsel for Plaintiff will not disrupt the suit . . . Amended Pleadings due by 9/8/2006 . . . " was not informed prior to my signing. Therefore, *it was a fraud.* Wang was very scared and sent the following e-mail to Prudential's attorney, Thomas Reddin, after signing the agreement:

> "From: Judy Wang
> [mailto:judy.wang@aaachamber.com]
> Sent: Thursday, August 24, 2006 8:39 PM
> To: Thomas E. Reddin
> Subject: is there still having Justice? Or is it just a money business?
> Importance: High"

"He had his secretary giving me last two pages paper to read and sign and then gave me copy of total 5 pages withdrawing paper document including the 3 pages I did not read prior my signature . . . What are my options now? Can I speak to the Judge?" *See* Pet. App. 1a-2a.

Wang's e-mail to Reddin, as shown, Wang was afraid of Loya at that time and was afraid to present this to the court. (Loya was a former football player, and he is as big as O J Simpson!). Prudential knew the facts, concealed the facts, objected by motion (Doc.55) and gave as a reason: that Wang agreed to this statement, as indicated by her signature. (C.R.419). Agreement's lack of mutuality undermines the integrity of the withdrawal proceeding and should constitute sufficient grounds to set it aside. This court is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *See Reeves v. Sanderson Plumbing,* 530 U.S. 133 (2000); *Smith v. City of Jackson*, 544 U.S. 228 (2005).

Prudential further misled the court that "There was no showing of any diligence." (C.R.419). Wang was diligent in discovering new evidence. *See Hopkins v. Ratliff,* 957 S.W.2d 300, 301 (Ky. App. 1997). Prudential's initial disclosure was not served until 04/06/2006. (C.R.95). "*Defendants have not responded to the Plaintiff's request for production of documents or interrogatories.*" (C.R.252). "Prudential has possession of all relevant documents including employee files, investigative files, all relevant electronic evidence that they have failed to produce in response to

Plaintiff's Request for Production of Documents" (C.R.255). On 8/31/**2006**, Wang filed motion to compel access to employment records. It was the *third* request following *11/17/**2004***, and *11/24/**2004*** (C.R.408, 411); requested EEOC files (Doc.50), ***Termination Procedure, Employment Handbook*** *on 03/31/**2005** (C.R.417)*. Prudential failed to disclose documents to the opponent.

Wang did not have adequate time to hire a replacement counsel. As a pro se she was required to study Local FRCP Rules, review the previous 47 court documents **within 8 days** to meet "*Amended Pleading*" (C.R.403-404) deadline. English is Wang's second language. She misunderstood "*Amended*" as "In addition to" in her Second Amended Pleadings and the district court dismissed prior TORT and *DEFAMATION* claims. The suit was already disrupted.

Legal counsel's withdrawal has been considered a reasonable, unforeseeable occurrence and constitutes "good cause" without regard to its basis or predictability. *See Madden v. Texas*, 498 U.S. 1301 (1991) wherein "Good cause is found to grant 30-day extensions of time . . . to find replacement counsel." It implies that district court not only abused its discretion but its attitude was unreasonable, arbitrary or unconscionable. *See Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

## II.

**Fifth Circuit wrongfully granted "extension of time" as a "PRIVILEGE" not a "RIGHT" in favor of Prudential but "Affirmed" denying Wang, a protected class, similar "extension of time."**

Prudential Appellee's Brief was initially due 10/17/2007, but was not filed until 11/20/2007, 33 days late, a Level II extension without written motion, without accompaniment of an "AFFIDAVIT" from either one of the attorneys, and without applying within the required 7 days before the due date. It failed to comply with Rules 26, 27, and 31 of FRAP to justify either Level I or Level II extension. The only effort Prudential made was: Wang received an incoming phone call from Prudential's Attorney David Johnson on **10/15/2007, 10:28 am** (817-420-8223), *see* Pet. App. 3a, to request the extension. "When a party seeking the extension is not diligent, the good cause inquiry ends." *Tampa Bay Storm v. Arena Football League*, No. 96-29-CIV-T-17C, 1998 U.S. Dist. LEXIS 5211 (M.D. Fla. Mar. 19, 1998). Prudential failed to show that, despite its diligence, the established timetable could not be met. *Briesacher v. AMG Res., Inc.*, No. 2:03 CV331, 2005 U.S. Dist. LEXIS 37394, at 5 (N.D. Ind. Aug. 31, 2005). (C.R.419). The Fifth Circuit decision conflicts with Wang's similar motion for extension of time. The same court denied Wang's appeal (No. 3:05-CV-2091), but affirmed a different case (No. 3:05-CV-0891).

Pursuant to Fifth Circuit Rule 26.2, "Appeals which are not processed timely will be dismissed for want of prosecution without further notice under Fifth Circuit Rule 42."

**The lower courts failed to preserve uniformity of decision in applying "extension of time" for granting "GOOD CAUSE SHOWN" standard.**

## III.

**Wang was wrongfully terminated. The "misconduct" cases Prudential articulated had been consolidated and closed with verbal training as a final action prior to her termination.**

The internal "misconduct" cases Prudential relied on 10/08/2004 to dismiss Wang had been dismissed prior to 09/16/2004; therefore, they were not grounds or precedent. It is evidenced by the "DEVELOPMENT CASE TOPSHEET" from 5/18/2004 to 9/16/2004, "the case number 2004-003104 was consolidated with 2004-002713 and was closed as a "final action with verbal training" from Prudential's Denise Cashman. (C.R.513-517, PRU00431-432). *See* Pet. App. 4a, 5a. "The *employer indicated a definite intent to be bound not to terminate Wang under clearly specified circumstance.*" (C.R.474).

Treta did recommend terminating Wang on **06/15/2004**. At that time, Treta attempted to improve his agency's ranking from bottom of 69/72 to save his

job. Prudential also experienced "Reduction In Force." *See* 2005 Prudential Annual Financial Report, pages 23-25. Wang was the oldest Chinese agent. But an exception was recommended after a 7 month investigation, and the final action was taken on **09/16/2004** not to terminate Wang. The real rationality was Wang actively participated in claiming a disputed commission, evidence by Wang's e-mail to Richard Treta on **09/19/2004**: "commission with $8400 annual premium was not calculated." (PRU000997). *See* Pet. App. 5a-7a. This activity is protected under Title VII and evidenced by e-mail from Kathryn Evans to Bobbie Shanklin on 10/05/2004 (PRU001010). *See* Pet. App. 8a-9a. Wang was told to be paid on 10/08/2004. Then Wang was suddenly terminated. This commission was reassigned to Richard Wang by using his personal e-mail address and home computer, against company provided legal procedures, to protect client's confidentiality and security, but secretly to solicit Judy Wang's client to sign the "changed agent" form to make Richard Wang as a new agent to claim Judy Wang's unpaid commission. (C.R.772-774). Client provided the evidences to Wang. Prudential based on evidences, *See* Pet. App. 12a-14a, agreed to pay Wang according to Prudential's determination letter on 01/21/2005 and 05/04/2005 after 7 month internal investigation. But this check was withheld until **12/20/2005 (C.R.961)** after district court granting summary judgment on **12/13/2006** in favor of Prudential to cover up for discrimina tion. Wang should receive this check within **6** days after employment separation. *See* Section 21 of

Texas Labor Code. As in the past, Wang's compensation was removed unfairly to others. One time it was to Richard Wang to boost his **first** month production up to **$22,000** and his supervisors were awarded higher bonuses because his new superstar status. Wang did not resolve further due to workload. It was the first time Wang complained about her discriminated compensation, and ultimately adverse employment occurred. Judy Wang was terminated, but young Richard Wang is still employed.

On 09/03/2004, Wang passed HS318 through American College program instead of University of Dallas program supported by Treta. That night, Wang's desk was wrecked by throwing everything down to the floor from the top of her desk. This occurred once before. On 10/02/2004, Treta made a sexual advance towards Wang which was unwelcomed and rebuffed by Wang again. Treta retaliated against Wang. (Doc.89). On 10/08/2004 at 3:45 p.m., Wang was restricted by security guards on each arm to prevent her from reaching her personal properties which were seized without her consent for three weeks and returned with severe damages. (C.R.550,551,600.)

NASD (now FINRA) did a phone interview with Charlene Weathers to verify her and John and Judy's special "family" bonding (Judy was a single parent, met Weathers when John was 4 months old). Also *see* Pet. App. 15a-17a. With Weather's two **disclosure statements** (C.R.905-908), NASD dismissed "Letter of Caution" on 09/29/2006 (C.R.530), and further reinstated Wang's "65 license" (C.R.791) without her

taking another exam because Prudential failed to register Wang. (C.R.546, 796). Treta slandered and defamed Wang with false and defamatory statements in the "process of termination" which was within the 300 days statute of limitations. **Prudential terminated Wang for "impermissible reason."**

> "It shall be an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . " 42 U.S.C. § 2000e-2(a)(1). *See EEOC v. Delaware Dept. of Health and Social Service*, 865 F.2d 1408, 1412-13 (3d Cir. 1989).

Pursuant to 28 U.S.C. § 1658, there is a four-year statute of limitations of section 1981 claims, no requirement to file with EEOC. State court has concurrent jurisdiction with federal district court. *See Jones v. R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1842 (2004). § 1658. "At-will employee could sue former employer under 42 U.S.C. § 1981." *See Spriggs v. Diamond Auto Glass*, 165 F.3d 1015 (4th Cir. 1999). Wang is protected under this statute.

Pursuant to Rule 56 of FRCP "The court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." *See*: *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party has the initial burden of demonstrating the

absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the non-moving party must present "specific facts showing that there is a genuine issue for trial."

Prudential did not respond Wang's "Request for Production" until ***10/10/2006*** and then filed Summary Judgment motion the next day on ***10/11/2006***, not "after adequate discovery as Prudential stated at the Joint Status Report" (C.R.174,184) to cause Wang not to have enough time to examine in detail (C.R.561) and identify the evidences from *1332 pages of PRU000001-PRU001332*. (C.R.513-517) and tried to response the summary judgment at the same time.

Wang responded with 27 discrimination facts in good faith (C.R.544-551) in chronological order, which identified the specific discrimination in detail and supported it with copy of official documents (C.R.620-722). **There were copies of** Prudential's own documents, e-mails should be admitted as "documentary evidence" even if it was without Wang's sworn statement." It did not rely on conclusory allegations or unsubstantiated speculation. *See Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998), but district court **excluded all the evidence**. Wang's ignorance of law caused her to realize that **Wang should submit the facts in the form of affidavit**, but corrected this with **11 affidavits** within her second "Joint Status Report" (C.R.765-925) and filed Reconsideration Motion (Doc.88), but was denied on **01/05/2007**. (Doc.90). Pursuant to Fed. R. Civ. P. 56(f)(2), district

court abused its discretion in declining to admit the supplemental affidavits **prior to discovery due**, failed to reasonably accommodate Wang's limited English proficiency ("LEP") and to "order a continuance to enable affidavits to be obtained." Wang came forward with contrary evidence to be tried. This is a procedural error, not facts without merit and should be taken into account for consideration since the affidavits from Prudential did not contain the correct information and should be struck. Prudential's affidavits are insufficient to challenge the entirety of Wang's merits, "what really happened." If "evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Fed. R. Civ. P. 56(e) advisory committee note (1963). *See Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980) (per curiam).

But new evidences were discovered that Treta sent a letter to Wang's former client, Wenqin Li, to inform her that **Kirsten Lowe**, a **younger Caucasian**, has been designated as Li's new agent to replace Wang. (C.R.1319-1321). But Wang was not aware of this until Wang accidentally met Li at Chinese supermarket. At which time Li gave Wang that letter which proved that Wang's job was replaced by an outside protected class. Wang met the 4th element to establish the *prima facie* case of Discrimination under ADEA. The same style, same date letter was also sent to client Ching Wu that Richard Wang (C.R.631) became Wu's new agent. Client Theresa

Thombs received a letter that Terry Dunn, a Caucasian, would be Thombs's new agent. *See* Pet. App. 18a-20a. Dale White and John Navarro, both are outside protected class and much younger than Wang, were hired after Wang's termination. (C.R.864-866,935). Wang was not a salaried employee and earnings were based on commission and reviewable commission from the established clients. Wang's former clients were reassigned to new agents by Treta by the above letters to receive Wang's reviewable commission. Wang's job was replaced and lost 5 years reviewable commission. Treta lied in his affidavit (Doc.68) and the district court failed to evaluate the facts within the Affidavit. In *Reeves v. Sanderson Plumbing Products, Inc.*, the Court clarified that cases should not be summarily decided if the Plaintiff produces evidence of a *prima facie* case of discrimination. Summary judgment was prematurely entered before the close of the discovery, and therefore forms a basis to disturb the judgment.

Wang did not fail to exhaust the Administrative remedies with EEOC (C.R.560). But EEOC lost Wang's files as evidenced by the letter from Director Robert Canino, Regional Attorney of Dallas District of EEOC to Wang on 09/12/2006 that "There is record in our data base that EEOC investigative file did exist. The file cannot be found." *See* Pet. App. 10a-11a. Pursuant to FRCP 56(e), "EEOC is withholding valuable and relevant information on this case" (C.R.567-568) and that the disputes over facts might affect the outcome of this suit under the governing

law and preclude the summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 248 (1986).

## ARGUMENTATION

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 896 n.5, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Court emphasized the distinction between Fed. R. Civ. P. 6(b) and Rule 6(b)(1) which allows grant of an extension if a "request" is made **before** the time for filing expires, but **post-deadline extension** may be granted **only "for cause shown"** and "upon motion." Wang filed timely motion **prior** to Amended Pleadings being due, **not post-deadline** extension. Pursuant to Fed. R. Civ. P. 16(b)(4): "A schedule may be modified only for good cause and with the judge's consent." And considering all the facts and procedural history, Wang's difficult circumstances should constitute as "Good Cause Shown" and granted timely motion for extension of time. Prudential has not only omitted material facts, but has materially misrepresented the facts and exhibited a pattern of bad faith. Prudential accordingly cannot meet its burden of proof.

"It is often impracticable to require a plaintiff whose job was eliminated to show replacement." *See Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 653 (3d Cir. 1986), and *Anderson v. CRNRAIL*, 297 F.3d 242 (3d Cir. 2002). But Wang meets all the 4 elements of the *prima facie* case; therefore summary judgment

was improper. Summary Judgment is proper only if there is no genuine issue of material fact in the employment discrimination case. *See Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc). ***Prudential presents no evidence that Wang was not qualified or not treated less favorably, and offers no reason for the action taken against Wang. The judgment should be reversed.*** *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

**The determination of whether neglect was excusable or inexcusable** "must of necessity take into consideration all the surrounding facts and circumstances." *Griffey v. Rajan*, 33 Ohio St.3d 75, 79, 514 N.E.2d 1122, 1126 (1987), quoting *Colley v. Bazell*, 64 Ohio St.2d 243, 249, 416 N.E.2d 605, 609 (1980). "Courts must also remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds." *Griffey*, supra, at 79 and 81, 514 N.E.2d at 1126, and 1127. Wang was not allowed any mistakes; whereas, Prudential was granted several mistakes. Discrimination against Wang is obvious.

## CONCLUSION

Wang is a victim of employment discrimination, a member of a class protected by relevant statutes. Pursuant to RULE 44, RULES OF THE SUPREME COURT, this **Petition for Rehearing**, based on the above intervening circumstances of a substantial or controlling effect, and other substantial grounds not previously presented, **should be granted**.

Respectfully submitted,

JUDY WANG, CHFC
P.O. Box 15632
Fort Worth, TX 76119
Tel: 817-475-4783

## CERTIFICATE OF GOOD FAITH

Petitioner hereby certifies that the foregoing Petition for Rehearing, was Submitted in good faith and not for purposes of delay.

This 10th day of November, 2008

JUDY WANG, CHFC
P.O. Box 15632
Fort Worth, TX 76119
Tel: 817-475-4783

## APPENDIX A – Wang's E-mail to Thomas Reddin on 08/24/2006 when Rawl Loya Withdrawal

**From:** Judy Wang [mailto:judy.wang@aaachamber.com]
**Sent:** Thursday, August 24, 2006 8:39 PM
**To:** Thomas E. Reddin
**Subject:** is there still having Justice? Or is it just a money business?
**Importance:** High

**He had his secretary giving me last two pages paper to read and sign and then gave me copy of total 5 pages withdrawing paper document including the 3 pages I did not read prior my signature. He is not going to let the Judge sign the paper until next week. He will continue to play the game until he is SAFE and I am dead. There is no sign of returning my $5000 of $10,000 fee. He did not spend more than 5 hours work. He hid the court papers from me until my old friend Joe Orr (legal council for World Affair Council) told me that I could go to the courthouse to get the paper. I should get the Discovery paper to reply on 3/10/2006, but his secretary did not give to me until 4/24/2006 without any instruction and then my aunty passing on 4/25/2006. Up to 5/25/2006, I was still writing the paper all night and missed the plant and had to take the next one to go to Hawaii to attend my son's wedding. He told me he was going to me on that Sunday to review the papers but he never showed up. He is not interested in**

**reading the discovery at all and I was so upset and lost my cell phone . . .**

**He still did not give back my files and money. What are my options now? Can I speak to the Judge?**

**My case has not been represented at all! There is no Justice at all!**

**I know my case very well. I just want to present the facts and get my fair share.**

**Please keep this information confidential for my personal safety.**

**Thanks.**

**Plaintiff,**

**Judy Wang, ChFC**

---

| ACCOUNT NAME | ACCOUNT NUMBER | TELEPHONE NUMBER |
|---|---|---|
| JUDY WANG | 000161654 | 817-475-4783 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 10/14/07 | 19:56 | FORT WORTH | TX | 817-878-2406 | NW | 1.00 | .00 |
| 10/14/07 | 23:17 | PLANO | TX | 972-491-0683 | NW | 2.00 | .00 |
| 10/15/07 | 10:11 | CRESSON | TX | 817-396-4563 | WD | 8.00 | .00 |
| 10/15/07 | 10:28 | INCOMING | CL | 817-420-8223 | WD | 1.00 | .00 |
| 10/15/07 | 21:12 | PLANO | TX | 972-491-0683 | NW | 15.00 | .00 |
| 10/15/07 | 21:36 | PLANO | TX | 972-202-0788 | NW | 5.00 | .00 |
| 10/16/07 | 9:29 | GRAND PRAR | TX | 469-733-6292 | WD | 2.00 | .00 |
| 10/16/07 | 13:30 | CRESSON | TX | 817-396-4729 | WD | 5.00 | .00 |
| 10/16/07 | 14:01 | INCOMING | CL | 408-568-2336 | WD | 2.00 | .00 |
| 10/16/07 | 16:47 | PLANO | TX | 972-202-0788 | WD | 1.00 | .00 |
| 10/16/07 | 18:09 | CARROLLTON | TX | 972-416-0370 | WD | 1.00 | .00 |
| 10/16/07 | 18:12 | 800 SERVIC | CL | 800-669-3900 | WD | 1.00 | .00 |
| 10/16/07 | 20:42 | PLANO | TX | 972-202-0788 | WD | 1.00 | .00 |
| 10/16/07 | 21:37 | PLANO | TX | 972-202-0788 | NW | 12.00 | .00 |
| 10/16/07 | 23:27 | INCOMING | CL | 408-568-2336 | NW | 7.00 | .00 |
| 10/17/07 | 12:04 | FORT WORTH | TX | 817-420-8223 | WD | 1.00 | .00 |
| 10/17/07 | 12:05 | DALLAS | TX | 214-745-5400 | WD | 1.00 | .00 |
| 10/17/07 | 12:06 | DALLAS | TX | 214-745-5400 | WD | 2.00 | .00 |
| 10/17/07 | 16:19 | CRESSON | TX | 817-396-4729 | WD | 1.00 | .00 |
| 10/17/07 | 19:57 | NEW YORK | NY | 212-431-8258 | WD | 4.00 | .00 |
| 10/17/07 | 21:19 | PLANO | TX | 972-985-4798 | NW | 6.00 | .00 |
| 10/17/07 | 23:40 | FRISCO | TX | 214-705-8338 | NW | 1.00 | .00 |
| 10/17/07 | 23:52 | SAN JOSE S | CA | 408-528-2336 | NW | 1.00 | .00 |
| 10/17/07 | 23:53 | MADERA | CA | 559-674-8391 | NW | 10.00 | .00 |
| 10/18/07 | 1:15 | MADERA | CA | 559-674-8391 | NW | 8.00 | .00 |
| 10/18/07 | 10:59 | FORT WORTH | TX | 817-420-8223 | WD | 3.00 | .00 |
| 10/18/07 | 15:14 | 800 SERVIC | CL | 800-669-3900 | WD | 1.00 | .00 |
| 10/18/07 | 16:11 | CARROLLTON | TX | 972-416-0370 | WD | 1.00 | .00 |
| 10/18/07 | 16:58 | PLANO | TX | 972-985-4798 | WD | 11.00 | .00 |
| 10/18/07 | 18:20 | GRAND PRAR | TX | 214-642-9977 | WD | 1.00 | .00 |
| 10/18/07 | 18:28 | GRAND PRAR | TX | 214-642-9977 | WD | 1.00 | .00 |
| 10/18/07 | 18:51 | GRAND PRAR | TX | 214-642-9977 | WD | 2.00 | .00 |
| 10/18/07 | 19:02 | ARLINGTON | TX | 817-937-3824 | WD | 1.00 | .00 |
| 10/18/07 | 21:36 | PLANO | TX | 972-491-0683 | NW | 20.00 | .00 |
| 10/19/07 | 10:02 | PLANO | TX | 972-202-0788 | WD | 1.00 | .00 |
| 10/19/07 | 10:02 | PLANO | TX | 972-491-0683 | WD | 3.00 | .00 |
| 10/19/07 | 11:08 | INCOMING | CL | 817-923-2729 | WD | 3.00 | .00 |
| 10/19/07 | 11:27 | FORT WORTH | TX | 817-926-9868 | WD | 1.00 | .00 |
| 10/19/07 | 14:27 | 800 SERVIC | CL | 800-669-3900 | WD | 4.00 | .00 |
| 10/19/07 | 15:09 | 800 SERVIC | CL | 800-669-3900 | WD | 2.00 | .00 |
| 10/19/07 | 18:54 | PLANO | TX | 972-202-0788 | WD | 4.00 | .00 |
| 10/19/07 | 18:59 | PLANO | TX | 972-202-0788 | WD | 2.00 | .00 |
| 10/19/07 | 21:15 | FORT WORTH | TX | 817-926-9868 | NW | 2.00 | .00 |
| 10/19/07 | 22:25 | FORT WORTH | TX | 817-923-2729 | NW | 1.00 | .00 |
| 10/19/07 | 22:28 | DALLAS | TX | 972-910-0040 | NW | 2.00 | .00 |
| 10/19/07 | 22:32 | FORT WORTH | TX | 817-292-6898 | NW | 3.00 | .00 |
| 10/20/07 | 7:03 | DALLAS | TX | 972-910-0040 | NW | 1.00 | .00 |
| 10/20/07 | 15:04 | PLANO | TX | 972-985-4798 | NW | 1.00 | .00 |
| 10/20/07 | 15:04 | FORT WORTH | TX | 817-534-8119 | NW | 1.00 | .00 |
| 10/20/07 | 15:38 | GRAND PRAR | TX | 469-261-1261 | NW | 1.00 | .00 |
| 10/20/07 | 15:39 | GRAND PRAR | TX | 469-261-1261 | NW | 1.00 | .00 |
| 10/20/07 | 16:44 | CRESSON | TX | 817-396-4459 | NW | 1.00 | .00 |
| 10/20/07 | 16:49 | FORT WORTH | TX | 817-246-5227 | NW | 2.00 | .00 |
| 10/20/07 | 16:57 | FORT WORTH | TX | 817-246-5227 | NW | 11.00 | .00 |
| 10/20/07 | 23:04 | FORT WORTH | TX | 817-926-9868 | NW | 1.00 | .00 |
| 10/21/07 | 1:00 | FORT WORTH | TX | 817-926-9868 | NW | 1.00 | .00 |
| 10/21/07 | 17:07 | CARROLLTON | TX | 972-416-0370 | NW | 3.00 | .00 |
| 10/21/07 | 17:18 | FRISCO | TX | 214-705-8338 | NW | 1.00 | .00 |

Pet. App. 3

**APPENDIX B - incoming phone call from Prudential's Attorney David Johnson on 10/15/2007, 10:28 am to request the extension**

BEST AVAILABLE COPY

# DEVELOPMENT CASE TOPSHEET

| | | | |
|---|---|---|---|
| **Case Number:** | 2004-003104 | **Agent Name:** | WANG, JUDY |
| **PPS Case Number:** | 040501070-00 | **Contract Number:** | 816258 |
| **SPOCS Case Number:** | TX01-01108 | | |
| **Start Date:** | 5/18/2004 | **Service Date:** | 9/13/1999 |
| **Closed Date:** | 9/16/2004 | **Agency Code:** | TX01 |
| **Final Action:** | Consolidated Case | **Region:** | E |
| **Final Action Date:** | 9/16/2004 | **Managing Director:** | |
| **RCRM Contact:** | Denise Cashman | | |
| **RCRM Manager:** | | | |

Pet. App. 4
APPENDIX C -
"Development Case Topsheet"
from Prudential's Denise Cashman.
(C.R. 513-517, PRU00431-432).

## Case Information:

| | | | |
|---|---|---|---|
| **Client Name:** | **WEATHERS, CHARLENE** | **Substantiated:** | |
| **Policy Number:** | **V6057238** | **Referred by:** | **Field Office** |
| **Product Type:** | **ULII PRULIFE UNIVERSAL PLUS** | **Source:** | **Underwriting** |
| **Primary Questioned Activity:** | Misconduct | | |
| **Supplemental Questioned Activity:** | | | |

**Case Summary:**

**Conflict of interest as Agent's son listed as primary bene. No exception was made by agency Mgmt.**
**Case is permanently rejected - MD recommends closing with verbal training.**
**Training**

## RCRM Analysis:

## Referral Information:

| | |
|---|---|
| **Date Referred:** | **Referred To:** |
| **Date Returned:** | |

## Disposition:

| | | | |
|---|---|---|---|
| **Date Letter Sent:** | | **MD Recommended Action:** | Training |
| **Date Acknowledged:** | | **RCRM Recommended Action:** | |
| **Date Returned to RCRM:** | | **Final Action Taken:** | Consolidated Case |

| Comments: | | |
|---|---|---|
| d001479 | 9/16/2004 11:31:19 AM | Case Consolidated with 2004-002713 . Case Closed |
| N355538 | 6/2/2004 1:46:22 PM | Sent lotus note to Agency Management requesting a recommended action. |
| N355538 | 5/27/2004 9:22:21 AM | Received agent statement, Agency Mgmt will also work with VTOC Lorinc to see if an exception request is acceptable. |
| N355538 | 5/21/2004 9:14:21 AM | Sent lotus note to Agency Management requesting statement and recommendation. An ownership change was completed on V6044476 naming agent's son as owner of Charlene Weathers existing policy. Was management aware of this and do they feel it is ok? |
| n344038 | 5/19/2004 4:42:22 PM | RCRM name changed to Denise Cashman. |
| n344038 | 5/19/2004 4:42:21 PM | RCRM name changed to Denise Cashman. |

**APPENDIX D – Wang's e-mail to Richard Treta and Bobbie Smith on 9/19/2004: "commission with $8400 annually premium was not calculated – V6060183 vs. V6059550". (PRU000997).**

**Judy X Wang**
TX01
Phone Number: 972-910-0040 ext 7244
Fax Number: 972-910-0583

Sunday September 19, 2004 11:41 PM

To: Richard Treta/IIG/Prudential @Prudential, NBST@Prudential

cc: Bobbie Smith/IIG/Prudential, Kathryn Evans/IIG/Prudential

Subject: commission with $8400 annually premium was not calculated – V6060183 vs V6059550

Hi Rich,

After 5 years, I finally learn to check my commission. **I caught a hugh error**.

The commission was calculated completed wrong and will affect my compensation and bonus.

1. **V6059550** was applied at $350,000 VUL with Premium non-smoker rate, $500/month. It was approved as **E rating** with 997.00.

2. The amount was decreased to $250,000, **with $700.00/month as V6060183**.

Due to policy # was changed, the annual premium $5984.40 was taken off after the positive delivery, but

the new annual premium $8400.00 was not added into it. **The whole case commission pay was only $350.00.**

**I think it was confused as $100,00.00 Term Essential L1039925 which is annual premium $584.00.**

**There is several thousand dollars difference. Please correct immediately.**

**Thanks. Judy X Wang**

---

**APPENDIX E – e-mail from Kathryn Evans to Bobbie Shanklin, dated 10/5/2004 (PRU001010), and "This affected her quarterly bonus as well as not getting paid full commission".**

**Kathryn Evans**
Operations & Controls Manager –
TX01 – Lone Star Agency
Phone Number: 972-910-0040 ext 7226
Fax Number: 972-910-0583

Tuesday October 5, 2004 06:10 PM

To: Bobbie Shanklin/IIG/Prudential@Prudential

cc:

Subject: Ask Field Compensation Question No. 43627 is Closed

Bobbie, can you please work on this appeal for me. This affected her quarterly bonus as well as not getting paid full commission.

Thanks!

– Forwarded by Kathryn Evans/IIG/Prudential on 10/05/2004 06:09 PM –

**Ask Field Compensation**

Sent by: Ask Field Compensation

TO REPLY TO THIS NOTE, CLICK ON THE LINK BELOW

To: Judy X Wang/IIG/Prudential@Prudential

cc: Bobbie Smith/IIG/Prudential,
Kathryn Evans/IIG/Prudential,
Richard Treta/IIG/Prudential

Subject: Ask Field Compensation Question No. 43627 is Closed

Wednesday September 29, 2004 09:34 AM

Your Question is:

Please make an exception to have this placed policy changed to reflect $700/month payment.

Our Response is:

09/29/2004 09:32:09 AM –

To correct the billed premium to $700.00/months please contact VUL post issue area at **866-GET-PRU8 (866-438-7788)**. When the Billed premium will be adjusted on-line you would need to submit appeal through your Managing director.

>> Thank you for using the Ask Field Compensation database

Great care has been taken to ensure the accuracy of our response, based on the information available to us at this time. Should you have further questions/comments regarding our response, you may contact us directly by clicking on the Reply link below.

---

**APPENDIX F – the letter sent from Director Robert Canino, Regional Attorney of Dallas District of EEOC to Wang on 9/12/2006 that "There is record in our data base that EEOC investigative file did exist. However, at this time, the file cannot be found."**

[LOGO] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**Dallas District Office**

September 12, 2006

Judy Wang
P.O. Box 15632
Fort Worth, Texas 76119

**FOIA No.: A6-11-FOIA-680-DA**

**CHARGE NUMBER: 310-2005-04482**

(Filed July 26, 2007)

Dear Ms. Wang:

The Dallas and Oklahoma District Offices conducted a diligent search for the investigative file responsive to your inquiry with respect to Judy Wang v. Prudential Financial Corporation, but have been unable to locate it. There is record in our data base that the EEOC investigative file did exist. However, at this time, the file cannot be found. The Dallas and Oklahoma District Office will continue to search for the file.

You may appeal my determination of your request by writing within thirty days of receipt of this

letter to Assistant Legal Counsel, FOIA Programs, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. Your appeal will be [illegible] 29 C.F.R. § 1610.11 which requires that you attach a copy of the Regional Attorney's determination with the FOIA appeal.

Sincerely,

/s/ Robert A. Canino
Robert Canino
Regional Attorney

UNITED STATES DISRTICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[EXHIBIT 51]

| | | |
|---|---|---|
| JUDY WANG, | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION |
| PRUDENTIAL FINANCIAL CORPORATION, PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY RICHARD TRETA | § | No. 3-5CV2091-B |
| | § | |
| | § | |
| | § | |
| | § | |
| | § | |
| Defendants. | § | |

AFFIDAVIT OF ALEXANDER CHENG

STATE OF TEXAS

COUNTY OF DALLAS

Before me, the undersigned authority, came on this day Alexander Cheng, who Being personally known to me, was sworn and stated under oath as follows:

1. My name is Alexander Cheng. I am over 21 years of age and am competent in all respects to make this Affidavit. I swear that the facts set forth in this Affidavit is within my personal knowledge and is true and correct.

2. I remember and witness that I along with my wife and my daughter attended the July 4, 2004 celebration at Prudential Irving Judy Wang's office at 5215 N. O'Connor Blvd, Suite 700, Irving, TX 75039.

3. There were some other guests attending too, including Katherine Dress, Lilly White, Kain Chan and his wife, and others, including the other Prudential agent Richard Wang, his wife, and their small son. We were enjoying eating the delicious food that Judy Wang prepared for us and watched the firework through the window. It was a perfect space to avoid the outdoor mosquito bites and the crowds.

4. When I was there, I heard Richard Wang was telling Judy Wang that "Why do you need to work so hard, you are so old already? You should resign and give your clients to me" and his wife repeated the same message again to Judy Wang. I was behind of them and they did not see me. I did not say anything to them.

5. A few months later around October 2004, I received a phone call from Richard Wang that he just got back from vocation and the company had reassigned my life insurance policy to Richard Wang that he further asked me to sign the "Transfer Report Serving Responsibility". (Exhibit A). He stated that my agent Judy Wang already left Prudential. My wife and my daughter also have the life policies but he did not say anything about it. I

was totally shocked because Judy Wang did not tell me that she already left Prudential. Everything looked very strange to me and I contacted Judy Wang and provided Judy Wang the email Richard Wang sent out from his home computer v from Prudential office computer. (Exhibit B).

FURTHER AFFIANT SAITH NAUGHT.

/s/ Alexander Cheng
ALEXANDER CHENG

SUBSCRIBED AND SWORN TO BEFORE ME BY the said Alexander Cheng on this 29th of day of May, 2007 to certify which witness my hand and official seal.

/s/ Wendy Kao
Notary Public in and
for the State of Texas

My Commission expires:

10-24-2010

[SEAL] WENDY KAO
MY COMMISSION EXPIRES
October 24, 2010

/s/ Wendy Kao
Printed Name
of Notary

[Exhibits Omitted In Printing]

UNITED STATES DISRTICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[EXHIBIT 9]

| | | |
|---|---|---|
| JUDY WANG, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION |
| | § | No. 3-5CV2091-B |
| PRUDENTIAL FINANCIAL CORPORATION, PRUDENTIAL | § | |
| INSURANCE COMPANY OF | § | |
| AMERICA, D/B/A PRUDENTIAL | § | |
| INSURANCE COMPANY | § | |
| RICHARD TRETA | § | |
| | § | |
| Defendants. | | |

AFFIDAVIT OF THERESA THOMBS
CONCERNING MS. CHARLENE WEATHERS

STATE OF TEXAS

COUNTY OF DALLAS

Before me, the undersigned authority, came on this day Theresa Thombs, who Being personally known to me, was sworn and stated under oath as follows:

1. My name is Theresa Thombs. I am over 21 years of age and am competent in all respects to make this Affidavit. I swear that the facts set forth in this Affidavit is within

my personal knowledge and is true and correct.

2. I have known Judy Wang and Charlene Weathers for more than ten years.

3. When Judy Wang was unable to answer her cell phone, the phone would forward to me. Charlene Weathers called Judy Wang constantly and she would introduce herself as Wang's Texas mother. Judy also accompanied Ms. Weathers to my home for dinner therefore she would be able to have social Activities besides the routine grocery shopping, driving to doctor appointments, banking and the other daily needs with Judy's aid and expenses.

4. Ms. Weathers constantly talks about Judy's son, John Michael Wang, he is her only grandson that she helped to raise him since he was four months old. She is so proud of his admission to MIT with the scholarship of EDS which Was in partnership with the Education Employee Credit Union (EECU), her and Judy's bank. She attended the award ceremony when John was the Captain of UIL State Champion Computer Programming. He also was awarded the 4-year scholarship from Texas Higher Education. She attended John's graduation from MIT, his wedding, etc. and other family activities as part of the Wang family.

5. Ms. Weathers had three children but none of them are close to her. Therefore Judy is the

only "close family member" who can attend to her daily needs.

6. Ms. Weathers has considered Judy her daughter and John her grandson for as long as I have known Judy Wang.

7. I have known Judy Wang for more than ten years. I have never known her to be a dishonest person. If I had, I never would have invested my money with her.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Theresa M. Thombs
THERESA THOMBS

SUBSCRIBED AND SWORN TO BEFORE ME BY the said Alexander Cheng on this 29 of day of May, 2007 to certify which witness my hand and official seal.

/s/ Nancy B. Carter
Notary Public in and
for the State of Texas

My Commission expires:

[SEAL]
NANCY B. CARTER
MY COMMISSION EXPIRES
AUGUST 27, 2010

/s/ Nancy B. Carter
Printed Name
of Notary

UNITED STATES DISRTICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[EXHIBIT 71]

| | | |
|---|---|---|
| JUDY WANG, | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION |
| | § | No. 3-5CV2091-B |
| PRUDENTIAL FINANCIAL CORPORATION, PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY RICHARD TRETA | § | |
| | § | |
| | § | |
| | § | |
| | § | |
| Defendants. | § | |

AFFIDAVIT OF THERESA THOMBS
CONCERNING AGENT TERRY DUNN

STATE OF TEXAS

COUNTY OF DALLAS

Before me, the undersigned authority, came on this day Theresa Thombs, who Being personally known to me, was sworn and stated under oath as follows:

1. My name is Theresa Thombs. I am over 21 years of age and am competent in all respects to make this Affidavit. I swear that the facts set forth in this Affidavit is within

my personal knowledge and is true and correct.

2. I filed a complaint on 4/16/2007 with Prudential, regarding the fact that since Judy Wang had been fired, no one was looking at my account since 2004 to insure my money was being allocated to correctly in order to maximize my Investment. I continue to pay the premium, but Judy Wang did not get the earned commission that she had established. She is one of the hard working persons I have ever known, and she is extremely Knowledgeable in products and what she was doing.

3. They assigned an agent named Terry Dunn in North Richland Hills who is Also an Auto and Home insurance agent. My first conversation with him, to me he had no idea what type of policy I had, or what investment portion of it was to be used for. He tried to tell me that Judy Wang had sold me the wrong policy. Upon further research, what I told him was correct that the total death benefit of type B included more then the $250,000. Later it was confirmed by the other senior agent, Bob Meconnie.

4. I later received a letter from Prudential stating that they had made Terry Dunn as my new agent. I will be requesting that he not be assigned as my agent, that I will request Bob Meconnie as my new agent.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Theresa M. Thombs
THERESA THOMBS

SUBSCRIBED AND SWORN TO BEFORE ME BY the said Alexander Cheng on this 29 of day of May, 2007 to certify which witness my hand and official seal.

/s/ Nancy B. Carter
Notary Public in and
for the State of Texas

My Commission expires:

[SEAL] NANCY B. CARTER
MY COMMISSION EXPIRES
AUGUST 27, 2010

/s/ Nancy B. Carter
Printed Name
of Notary